FILED

No. (1)

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In The Supreme Court of the United States

RACAL SURVEY U.S.A., INC.;
NCS INTERNATIONAL, INC.,
Plaintiff/Counter Defendants-Appellees,

v.

M/V COUNT FLEET, her engines,
tackle, furniture & appurtenances in rem; *et al.*,
Defendants,

TIDEWATER MARINE INTERNATIONAL, INC.,
Counter Claimant-Appellant.

RACAL SURVEY U.S.A., INC.;
NCS INTERNATIONAL, INC.,
Plaintiffs,

v.

M/V COUNT FLEET, her engines,
tackle, furniture & appurtenances in rem., *et al.*,
Defendants,

TIDEWATER MARINE INTERNATIONAL, INC., INTERVENOR,
Defendant-Appellant-Cross-Appellee,

v.

INPUT/OUTPUT, INC., INTERVENOR
Plaintiff-Appellee-Cross-Appellant.

**Petition for a Writ of Certiorari to the
United States Court of Appeals
For the Fifth Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in denying the existence of a maritime lien on the ground that the supplier seeking the lien had not shown that it had relied on the credit of the vessel, even though the Federal Maritime Lien Act provides that the supplier "is not required to allege or prove . . . that credit was given to the vessel."

2. Whether the court of appeals erred in holding that because materials necessary to a voyage were unilaterally transferred by the charterer from some vessels to other vessels, the materials were not supplied "to a vessel" within the meaning of the Federal Maritime Lien Act, and therefore the supplier of the materials did not have a maritime lien.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court rules 14(1)(b) and 29(6), Petitioner states that the following companies were parties to the proceeding for which review is sought:

1. Racal Survey U.S.A., Inc.
2. NCS International, Inc.
3. Tidewater Marine International, Inc.
4. Input/Output, Inc.

Since the case was initially filed, Racal Survey U.S.A, Inc. and NCS International, Inc., the plaintiffs below, have merged. The new name of Petitioner is Racal NCS, Inc.

Petitioner further states that the parent company of Racal NCS, Inc. is Thales TRC Inc., a wholly-owned subsidiary of Thales Holding Corporation, which itself is a wholly-owned subsidiary of Thales North America, Inc. Thales North America, Inc. is a wholly-owned subsidiary of Thales, S.A. Alcatel, a French corporation, owns 25.29 percent of Thales, S.A. No other publicly-traded company owns 10 percent or more of the stock of Thales, S.A.

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PETITION FOR A WRIT OF CERTIORARI

Racal Survey, U.S.A., Inc. and NCS International, Inc. (collectively "Racal")[1] petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The judgment order of the court of appeals (Pet'r App. 1a-17a) is reported at 231 F.3d 183. The order of the court of appeals denying rehearing (Pet'r App. 45a-46a) is unreported. The district court's ruling (Pet'r App. 18a-29a), amended ruling (to correct a typographical error) (Pet'r App. 30a-41a), and judgment (Pet'r App. 42a-44a) are also unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 24, 2000 (Pet'r App. 1a-17a) and a timely petition for rehearing *en banc* was denied on November 20, 2000 (Pet'r App. 45a-46a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The United States Constitution art. III, § 2, cl. 1 provides in part:

> The judicial power [of the United States] shall extend . . . to all Cases of admiralty and maritime Jurisdiction . . . .

46 U.S.C. § 31341 provides:

> (a) The following persons are presumed to have authority to procure necessaries for a vessel:

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[1] Racal Survey, U.S.A., Inc. and NCS International, Inc. have recently merged to become Racal NCS, Inc.

(1) the owner;

(2) the master;

(3) a person entrusted with the management of the vessel at the port of supply; or

(4) an officer or agent appointed by—

(A) the owner;

(B) a charterer;

(C) an owner pro hac vice; or

(D) an agreed buyer in possession of the vessel.

(b) A person tortiously or unlawfully in possession or charge of a vessel has no authority to procure necessaries for the vessel.

46 U.S.C. § 31342 provides:

(a) Except as provided in subsection (b) of this section, a person providing necessaries to a vessel on the order of the owner or a person authorized by the owner—

(1) has a maritime lien on the vessel;

(2) may bring a civil action in rem to enforce the lien; and

(3) is not required to allege or prove in the action that credit was given to the vessel.

(b) This section does not apply to a public vessel.

46 U.S.C. § 31305 provides:

This chapter does not prevent a mortgagee or other lien holder from waiving or subordinating at any time by agreement or otherwise the lien holder's right to a lien, the priority or, if a preferred mortgage lien, the preferred status of the lien.

STATEMENT OF FACTS

On March 25, 1996, Racal, a supplier of seismic and other equipment and specialized software, entered into an agreement with Coastline Geophysical, Inc. to lease equipment to Coastline for use in a seismic exploration of a portion of the Gulf of Mexico for areas that might be suitable for production of crude oil or natural gas. The leased equipment included computer hardware and software, satellite receivers, radio receivers, and display apparatus, much of which was highly specialized for the operations the vessels would be undertaking. The equipment's primary role was to aid the vessels in the critical function of coordinating seismic information among themselves, and the equipment was appropriate only for use on maritime vessels. The equipment was installed on March 27, 1996 on four vessels belonging to Tidewater Marine, Inc. ("TMI"). Coastline had control over the vessels pursuant to a charter agreement Coastline had executed with TMI in February 1996.

After the termination of that charter, Coastline executed a second charter agreement in August 1996 with Tidewater Marine International, Inc. ("Tidewater"), a company affiliated with TMI. This second charter involved four vessels other than those Coastline had used under the first charter. Coastline transferred the equipment it had leased from Racal to vessels covered by the second charter.

Coastline then became insolvent and defaulted on payments to both Tidewater and Racal. When the vessels returned to the United States, Racal arrested three of them, asserting its rights to a lien against the vessels under the Federal Maritime Lien Act ("FMLA" or "Act"), 46 U.S.C. §§ 31341-31343 (1988). However, Tidewater secured the release of the vessels and disputed Racal's right to a lien.

Racal filed suit in the United States District Court for the Western District of Louisiana, asserting in part that, under the Maritime Lien Act, Racal's furnishing of equipment to the

vessels created a lien in its favor against those vessels. Racal filed a partial motion for summary judgment in which it asked the court to find that it had a valid lien under the Act. Tidewater opposed the motion and filed its own cross-motion for summary judgment. The district court ruled in favor of Racal.

On appeal the United States Court of Appeals for the Fifth Circuit reversed. Relying on its earlier decision in *Equilease Corporation v. Sampson*, 793 F.2d 598 (5th Cir. 1986) (*en banc*), the court of appeals cited deposition testimony of Racal's president[2] to hold that Racal had not relied on the credit of the vessels in supplying the equipment, and therefore that no lien against the vessels was created in Racal's favor. *Racal Survey U.S.A., Inc. v. M/V Count Fleet*, 231 F.3d 183 (5th Cir. 2000) (Pet'r App. 1a-17a). The court did not discuss, and the record does not reveal, whether Racal had even been aware of the existence of the Federal Maritime Lien Act or its protections. Nonetheless the court held that "the testimony explicitly shows that Racal deliberately chose not to rely on the credit of the four chartered vessels" and therefore must have intended to forego the protections of the Act. *Id.* at 190.

The court of appeals also held that a maritime lien was not created in Racal's favor because the equipment was not furnished to the vessels within the meaning of the Federal Maritime Lien Act. The court placed heavy emphasis on the fact that Coastline had transferred the equipment Racal had provided from one set of vessels to another. Relying partially

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[2] In response to the question, "So you weren't relying on credit of Tidewater or any of its vessels" when Racal agreed to supply the equipment, Racal's president stated "Yeah, I mean, our contract was with Coastline. That was our customer." And in answer to the question "you weren't looking to Tidewater or any of its vessels for payment . . . ." Racal's president answered "I had no contract with Tidewater." (Pet'r App. 9a-10a).

on this Court's decision in *Piedmont & George's Creek Coal Company v. Seaboard Fisheries Company*, 254 U.S. 1 (1920), the court held that the equipment was therefore not provided exclusively to the vessels Coastline obtained under the second charter agreement with TMI, and that this fact defeated the creation of a lien on those vessels. (Pet'r App. 13a-16a).

On November 20, 2000 the Fifth Circuit rejected a timely filed petition for rehearing. (Pet'r App. 45a-46a).

HISTORY AND DEVELOPMENT OF THE FEDERAL MARITIME LIEN ACT

A. The Law Before The Federal Maritime Lien Act

The law of maritime liens arose out of the unique needs of the maritime industry. Because their function is transient, ships routinely find themselves in distant ports, and often in need of supplies, equipment, repairs, and other materials to sustain their ability to function. But suppliers and merchants were often reluctant to provide such equipment, repairs, or other items of value to a vessel that would soon depart, as there was no way to assure payment. As a result, vessels often encountered difficulty in obtaining "necessaries" for their journeys. As this Court noted in *Piedmont*:

> [A ship] is peculiarly subject to vicissitudes which would compel abandonment of vessel or voyage, unless repairs and supplies were promptly furnished. Since she is usually absent from the home port, remote from the residence of her owners and without any large amount of money, it is essential that she should be self-reliant – that she should be able to obtain upon her own account needed repairs and supplies.

Piedmont, 254 U.S. at 9. Generally, therefore, a maritime lien against the vessel arose in favor of anyone who supplied necessaries to it, thus encouraging the supply of things needed by vessels visiting their ports and aiding the development of maritime commerce.

Prior to the initial enactment of the Federal Maritime Lien Act in 1910, maritime liens were a creature of state law (even though they could be enforced against the vessel exclusively in federal court under the federal maritime jurisdiction; *see* Judiciary Act of 1789, § 9, 1 Stat. 77, now codified at 28 U.S.C. § 1333). The general rule was that a lien against a vessel was created in favor of a supplier simply by the act of supplying such necessaries to a vessel. Under some decisions there were two noteworthy exceptions: no lien was created where either (1) the vessel owner personally obtained the necessaries, or (2) the necessaries were obtained in the vessel's home port. In such situations, the supplier of necessaries was presumed to be relying on the owner's personal credit, rather than the credit of the vessel. *See generally,* Fitz-Henry Smith, Jr., "The New Federal Statute Relating to Liens on Vessels," 24 Harv. L. Rev. 182 (1910-1911). However, as noted in an article published several years prior to the enactment of the Federal Maritime Lien Act (and cited with approval by this Court in *Piedmont*, 254 U.S. at 12, n.3) there were inconsistencies in the law of the several states, including with respect to the scope of these exceptions. *See* Fitz-Henry Smith, Jr., "The Confusion in the Law Relating to Materialmen's Liens on Vessels," 21 Harv. L. Rev. 332 (1907-1908).

B. The Enactment Of The Federal Maritime Lien Act

In 1910 Congress passed the "Act relating to liens on vessels for repairs, supplies, or other necessaries," Act of June 23, 1910, 36 Stat. 604, which created a single and uniform federal standard to replace state law. The Act codified the doctrine that the supplying of necessaries to a vessel creates a lien against that vessel, regardless of whether the necessaries were obtained in the vessel's home port or whether the owner was present. Congress reenacted the law in a substantially equivalent form in 1920, under the name "Federal Maritime Lien Act." Act of June 5, 1920, 41 Stat.

1005. Between 1983 and 1988, Congress reorganized the original statutory provisions when it enacted major revisions to the federal maritime laws, including the law of maritime liens. Pub. L. No. 98-89, 97 Stat. 500 (1983); Pub. L. No. 99-509, 100 Stat. 1913 (1986); Pub. L. No. 100-710, 102 Stat. 4748 (1988). Those revisions did not alter the substance of the Federal Maritime Lien Act,[3] the heart of which provides that:

> [A] person providing necessaries to a vessel on the order of the owner or a person authorized by the owner—
>
> (1) has a maritime lien on the vessel;
>
> (2) may bring a civil action in rem to enforce the lien; and
>
> (3) *is not required to allege or prove in the action that credit was given to the vessel.*

46 U.S.C. § 31342 (emphasis added).[4] The Act also describes the individuals who are "presumed to have authority to procure necessaries for a vessel," 46 U.S.C. § 31341, and creates a mechanism for a person claiming a lien on a preferred mortgage vessel to record that lien. 46 U.S.C. § 31343. The law also includes a provision under which a supplier of necessaries may waive his or her right to a lien:

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[3] The primary purpose of the 1988 law was to bring together "a confusing collection of individual statutes enacted over a period of nearly two centuries" in a more organized fashion, "to make it more understandable for everyone involved." H. R. Rep. No. 98-338 (1983).

[4] Prior to the 1988 law, this provision was codified at 46 U.S.C. § 971, and read: "Any person furnishing . . . necessaries . . . to any vessel, whether foreign or domestic, upon the order of the owner of such vessel, or of a person authorized by the owner, shall have a maritime lien on the vessel, which may be enforced by suit in rem, *and it shall not be necessary to allege or prove that credit was given to the vessel.*" (emphasis added). Some of the cases discussed herein were decided prior to the passage of the 1988 Act, and so refer to 46 U.S.C. § 971 instead of its current codification at 46 U.S.C. § 31342.

"This chapter does not prevent a mortgagee or other lien holder from waiving or subordinating at any time by agreement or otherwise the lien holder's right to a lien, the priority or, if a preferred mortgage lien, the preferred status of the lien." 46 U.S.C. § 31305.

Congress had several purposes in enacting the FMLA: (1) to "do away with the artificial distinction between foreign and domestic vessels[5] and put on the same footing necessaries furnished in the home State and necessaries furnished in foreign ports or States." S. Rep. No. 61-690 (1910), (2) to eliminate the exception that prevented the creation of the lien when the vessel owner personally obtained the necessaries, and (3) to impose uniformity in the law of maritime liens. *See, e.g., Piedmont,* 254 U.S. at 11. A scholarly article appearing contemporaneously with the passage of the Act, and later cited with approval by this Court, *see Piedmont*, 254 U.S. at 12, n.3, states that the Act abolished "the distinction between domestic and foreign ports and with the presumption once said to attach to the owner's presence in any port" and that, given those changes, "the requirement of proof that the vessel was credited seemed unnecessary and, if retained, more apt to continue the confusion which it was the express purpose of the Act to avoid." Fitz-Henry Smith, Jr., "New Federal Statute Relating to Liens on Vessels," 24 Harv. L. Rev. 182, 189-190 (1910-1911). That article also states that under the Act, "the burden is on the person *disputing* the lien to show that the same has been waived." *Id.* at 190 (emphasis added).

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[5] The word "foreign" refers not just to vessels from foreign countries, but also to vessels from states other than the state where the necessaries were supplied; the word "domestic" refers to vessels whose home port is in the state where the necessaries are supplied. *See* Fitz-Henry Smith, Jr., "The New Federal Statute Relating to Liens on Vessels," 24 Harv. L. Rev. 182, 184 (1910-1911).

C. The Consideration Of The Federal Maritime Lien Act In The Courts

This Court had occasion to consider the Federal Maritime Lien Act in *Piedmont & George's Creek Coal Company v. Seaboard Fisheries Company*, 254 U.S. 1 (1920). In that case, Piedmont had furnished coal to a shipping company; some of the coal would be used on the company's vessels and some would be used in the company's shoreside factories. The question was whether this supply of coal to the shipping company constituted furnishing necessaries to vessels. In discussing the Act, this Court observed (per Brandeis, J.) that if the coal was deemed to be furnished to the vessels, "maritime liens would have arisen and could have been established under the statute without proof that credit was given to the vessels." *Id.* at 10. The Court also said, in describing the Act, that with the three exceptions noted above, the Act "makes 'no changes in the general principles of the law of maritime liens, but merely substitutes a single statute for the conflicting state statutes.'" *Id.* at 11-12, *quoting* S. Rep. No. 61-831 (1910). However, these statements were dicta because the Court held that the coal was not supplied to vessels within the meaning of the Act (given that, at the time of delivery, it could not be determined whether the coal would be consumed on vessels or at a factory). *Piedmont*, 254 U.S. at 7-8, 13. The Court repeated this dictum in *Dampskibsselskabet Dannebrog v. Signal Oil & Gas Co. of California*, 310 U.S. 268, 271-272 (1940), a case that also involved the question of whether necessaries had been furnished to a vessel. Since its 1940 decision in *Dampskibsselskabet*, this Court has not decided any case concerning the entitlement to a lien under the Act. *See, e.g., S.C. State Ports Auth. v. M/V Tyson Lykes*, 67 F.3d 59, 62 (4th Cir. 1995) ("The Supreme Court has not taken up the subject [of entitlement to a lien] since the Oil Co. [i.e., *Dampskibsselskabet*] case . . . .").

In 1986, the Fifth Circuit decided *Equilease Corporation v. M/V Sampson*, 793 F.2d 598 (5th Cir. 1986) (*en banc*), holding, over a sharp dissent by Judge Davis, that evidence indicating that the supplier of the necessaries had relied solely on the credit of the vessel's owner, and not of the vessel itself, defeated the supplier's right to a lien. The Fifth Circuit acknowledged that "Equilease's argument at first appears to be contrary to the express language of the FMLA," which states that it is not necessary to allege or prove that credit was given to the vessel. *Id.* at 605. The Fifth Circuit supported its non-literal reading by citing this Court's opinion in *Piedmont*: "Piedmont held that the relevant language in the Act served only to remove from the creditor the burden of proving that he had relied on the credit of the vessel. The presumption that the vessel's credit was relied upon . . . was [now] granted to '[a]ny person'" regardless of whether the vessel was in its home port. *Id.* at 605, quoting 46 U.S.C. § 971. Relying on this Court as having held that the Act had such a limited function, the Fifth Circuit continued, "*[d]espite* the language of the Act, the idea of credit to the vessel being a prerequisite to a lien, and the concomitant principle that credit to the owner negates the lien, are still very much with us today." *Id.* at 605 (emphasis added). In the present case, the court of appeals relied directly on this language from its earlier decision in *Equilease* in refusing to recognize the creation of a lien in Racal's favor under the Federal Maritime Lien Act.

REASONS FOR GRANTING THE PETITION

Relying virtually exclusively on dicta from, and misreadings of, decisions of this Court in *Piedmont* and *Dampskibsselskabet*, the Fifth Circuit's decision (1) conflicts with decisions of at least two other circuits, creating non-uniformity such that a vessel may choose the law applicable to it respecting the existence of maritime liens by choosing the ports into which it sails and (2) applies what the Fifth Circuit recognizes is non-literal reading of a critical provision

of the FMLA, sowing confusion and uncertainty where Congress intended simplicity and uniformity. This Court should grant certiorari to settle the important issues of maritime law here presented, resolve the conflict among the circuits, and vindicate Congress's goal in enacting the FMLA.

As this Court's decision in *Piedmont* shows, the issue is important—indeed, crucial—to the shipping industry. The Court there noted that because a vessel is subject to "vicissitudes which would compel abandonment of vessel or voyage, unless repairs and supplies were promptly furnished . . . it is essential that she should be self-reliant—that she should be able to obtain upon her own account needed repairs and supplies." *Piedmont*, 254 U.S. at 9. The law of maritime liens was developed to "protect the ship," *id.* at 8, and allow it to obtain critical repairs and supplies; a decision that both adversely affects the availability of maritime liens and renders the law non-uniform, as does the decision below, merits review.

A. The Decision Below Conflicts With Decisions Of Two Other Circuits

Uniformity is particularly important in the area of maritime law. *See, e.g., Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 230 (1986); *Calbeck v. Travelers Ins. Co.*, 370 U.S. 114, 118 (1962). The need for uniformity is easy to see here: because "the ship's function is to move from place to place," *Piedmont*, 254 U.S. at 9, it is of particular importance that transactions undertaken with respect to a vessel in one place have the same consequences and impacts regardless of where the vessel goes. A vessel should not have the choice of being subject to a lien if it sails into one port but not if it sails into another. Indeed it was Congress's goal in enacting the FMLA to render the law applicable to maritime liens uniform, comprehensive, and easily applied. *See, e.g.*, S. Rep. No. 61-690 (1910) (the Act "is designed to remove the confusion

now existing in an important branch of the admiralty jurisprudence of the United States by simplifying the law and making it uniform throughout the country"); *Dampskibsselskabet*, 310 U.S. at 271-72 (the statute "provided a series of simple and comprehensive rules" to "simplify and clarify the rules as to maritime liens, as to which there had been much confusion"). Under the Fifth Circuit decision, however, it is clear that whether Petitioners had a valid maritime lien would have been decided differently in at least the Eleventh and First Circuits. Each of those Circuits holds that evidence of the very kind deemed dispositive by the Fifth Circuit in determining that no lien exists is utterly irrelevant. The Fifth Circuit's decisions, which accept evidence that the supplier of necessaries did not rely on the credit of the vessel and refuse to recognize liens on that basis, are in direct conflict with decisions from other Circuits.

In *Equilease*, the Fifth Circuit held that "[d]espite the language of the Act [which provides that the supplier 'is not required to allege or prove . . . that credit was given to the vessel'], the idea of credit to the vessel being a prerequisite to a lien, and the concomitant principle that credit to the owner negates the lien, are still very much with us today." *Equilease*, 793 F.2d at 605. Further, the Fifth Circuit held, a party can challenge the existence of a lien by "establishing that the personal credit of the owner or charterer was solely relied upon." *Id.* It was on this holding that the court of appeals based its refusal in the present case to recognize a maritime lien, placing entire reliance on two bits of deposition testimony in which the president of Racal agreed with his questioner that he was "not relying on" or "looking to" the credit of Tidewater or any of its vessels when entering into the contract with Coastline (*see* footnote 2, supra). The Fifth Circuit held that this testimony established that "Racal did not rely on the credit of the vessels," (Pet'r App. 12a), which was in its view sufficient to defeat the lien.

The law in other circuits is decisively to the contrary. In *Stevens Technical Services, Inc. v. United States*, 913 F.2d 1521 (11th Cir. 1990), the Eleventh Circuit refused even to consider exactly the same kind of evidence as that on which the Fifth Circuit decision turned—evidence that the supplier of necessities had expected to be paid by the contracting party rather than relying on the vessel's credit. The Eleventh Circuit held that "[e]xpectations that payment for the service would be made by some party other than the vessel does not vitiate a lien by one who, as permitted under § 971 [of the FMLA], is not required to prove reliance on the credit of the vessel." *Id.* at 1536. In the present case, as we have seen, the Fifth Circuit relied on this very evidence—in the form of the testimony of the subjective belief of the supply company's president—in refusing to recognize a lien. Thus the two circuits fundamentally disagree about whether evidence that the party supplying the necessaries relied on something other than the credit of the vessel can defeat the creation of a maritime lien. The Fifth Circuit finds such evidence decisive, and the Eleventh Circuit finds it irrelevant.

The First Circuit's decision in *Farrell Ocean Services, Inc. v. United States*, 681 F.2d 91 (1st Cir. 1982) is also in fundamental conflict with the Fifth Circuit's holding. There, a party sought to defeat the existence of a lien with evidence allegedly showing that the supplier of necessities had looked for payment to the person seeking repairs on the vessel rather than the vessel itself. *Id.* at 93. Rejecting this argument, the First Circuit held that evidence simply showing reliance on another party for payment was insufficient to defeat a lien, and that "[t]he party entitled to the lien must have taken *affirmative actions* that manifest a clear intention to forego the lien." *Id.* at 94 (emphasis added). The court stressed that "affirmative, protective action" is necessary to show waiver of the maritime lien, even where the supplier was aware of the recipient's precarious financial position, supplied a bill to

the owner's agent rather than the owner of the vessel, and accepted partial payment. *Id.*

Again the Fifth Circuit's holding is in conflict. The Fifth Circuit here held that testimony of the subjective lack of intention to charge the vessel by Racal's president—without any "affirmative, protective action"—was sufficient to defeat a lien. Indeed, the conflict on this point could hardly be more clear. Racal had argued that the testimony the Fifth Circuit found decisive "does not specifically indicate that Racal planned to waive the lien and rely solely on the credit of a party other than the vessel," and that therefore Racal had a lien. (Pet'r App. 10a). This precise argument was what prevailed in the First Circuit. But the Fifth Circuit rejected this position, concluding that the evidence that Racal's president did not intend to rely on the vessel's credit was sufficient to establish, "as a matter of law, [that the supplier] purposefully intends to forego its right to claim a maritime lien." *Racal*, 231 F.3d. at 189, 190.

Thus, the decisions of at least two other circuit courts of appeals—the Eleventh Circuit and the First Circuit—conflict with the Fifth Circuit's decision in *Racal* on this important issue. This Court should grant certiorari to resolve this conflict.

B. The Fifth Circuit's Decision Creates Non-Uniformity By Imposing A Non-Literal Interpretation Of The FMLA

The Federal Maritime Lien Act mandates that a lien is created simply by the supply of necessaries to the vessel and specifically states that in order to enforce the lien, the supplier "is not required to allege or prove in the action that credit was given to the vessel." 46 U.S.C. § 31342. Thus, once a person supplies necessaries to a vessel, that person automatically has a maritime lien, and evidence of reliance on

the credit of something other than the vessel is not relevant to whether a lien has arisen.

The Fifth Circuit's holding, however, requires what the Act says is not required. The decision below and the *Equilease* decision hold that, even if a person supplies necessaries to a vessel, that person does *not*, in fact, have a lien if evidence shows that he or she did not intend to rely on the credit of the vessel. In fact, the Fifth Circuit recognizes that these holdings conflict with the plain language of the Act, and that it accepts as dispositive the subjective state of mind of the supplier's president "*[d]espite* the language of the Act . . . ." *Equilease*, 793 F.2d at 605 (emphasis added). The court of appeals also described credit to the vessel as a "prerequisite" to a maritime lien, *id.*, when the Act itself says the only "prerequisite" to a maritime lien is that a person furnish necessaries to a vessel. Thus, the Fifth Circuit has contradicted existing statutory language and effectively grafted additional language onto the Act.

The Act does provide for waiver of its protections, stating that a person who already has a lien can waive it: "[t]his chapter does not prevent a . . . lien holder from waiving or subordinating at any time by agreement or otherwise the lien holder's right to a lien . . . ." 46 U.S.C. § 31305. However, as the First Circuit held in *Farrell*, § 31305 requires an actual affirmative waiver—not just after-the-fact testimony about the subjective intent of an employee of the company supplying the necessaries. *Farrell*, 681 F.2d at 93-94; *see also S.C. State Ports Auth. v. M/V Tyson Lykes*, 67 F.3d 59 (4th Cir. 1995) (holding that the supplier's taking of additional security does not relinquish its right to maritime lien on the vessels).[6]

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[6] *South Carolina State Ports Authority* is also notable because, although it was a waiver case decided after *Equilease*, the court did not cite to *Equilease*. Indeed, the district court decision in that case, also

More significantly, the Fifth Circuit plainly did *not* base its holding on § 31305—or even suggest that it might be relevant—in either *Equilease*[7] or the present case. As just noted, § 31305 provides that a lien holder can waive the lien, while the Fifth Circuit doctrine is that without reliance on the vessel's credit, a lien does not even arise. The Fifth Circuit has thus created a new and different doctrine, under which supplying necessaries to a vessel does not give rise to a maritime lien—i.e., where the party opposing the lien introduces evidence that the supplier relied on something other than the credit of the vessel. But this means of defeating a lien does not appear anywhere in the Act and, as the court of appeals acknowledged, departs from the language of the Act.[8]

In fact, the Fifth Circuit's decisions undo the work of Congress. The FMLA was enacted in part to clear up the confusion surrounding the issue of when the supplier relied on the credit of the vessel and when he or she relied on the credit of the owner. Prior to the enactment of the statute, federal courts struggled with the question of when the supplier of necessaries had a lien. *See, e.g., The General Smith*, 17 U.S. 438 (1819); *The St. Jago de Cuba*, 22 U.S. 409 (1824); Fitz-Henry Smith, Jr., "The Confusion in the Law Relating to Materialmen's Liens on Vessels," 21 Harv. L. Rev. 332 (1907-1908). The statute effected its clarification

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ignoring *Equilease*, cites to a *previous* decision of the Fifth Circuit, *Crustacean Transportation Corp. v. Atalanta Trading Corp.*, 369 F.2d 656 (5th Cir. 1966), for the proposition that services are presumptively provided on the credit of the vessel. *S.C. State Ports Auth. v. M/V Tyson Lykes*, 837 F. Supp. 1357 (D.S.C. 1993).

[7] At the time *Equilease* was decided, the waiver provision was located at 46 U.S.C. § 974.

[8] Further, in holding that a supplier's non-intention to rely on a vessel's credit is as effective as waiver of a lien under § 31305, the Fifth Circuit is essentially holding that the waiver provision of § 31305 is surplusage.

by unequivocally abolishing all requirements and presumptions having to do with whether or not the supplier relied on the credit of the vessel. The Fifth Circuit's decisions reintroduce this confusion into the law of maritime liens, by unnecessarily and inappropriately reintroducing prerequisites to the creation of a lien, and by muddying the distinction between prerequisites to the lien and waiver of an existing lien.[9] This Court should grant certiorari to return the law to the simplified and clarified state Congress had intended it to occupy (as the Court recognized in *Dampskibsselskabet*, 310 U.S. at 271-72).

C. Incorrect Interpretation Of This Court's Decisions

To support its non-literal reading of the FMLA, the Fifth Circuit relied exclusively, as we have seen, on its interpretation of this Court's opinion in *Piedmont*. The Fifth Circuit's reading is incorrect, and this Court should grant certiorari to rectify it.

In *Equilease*, the Fifth Circuit asserted that "Piedmont held that the relevant language in the Act served only to remove from the creditor the burden of proving that he had relied on the credit of the vessel." *Equilease*, 793 F.2d at 605. This was that court's sole basis for its conclusion—later repeated in *Racal*—that a maritime lien can be defeated merely by showing that the supplier of necessaries had relied on something other than the credit of the vessel. But *Piedmont* held no such thing, and did even state it in dictum. The Fifth Circuit's reading of *Piedmont* distorts this Court's statements in a manner that significantly weakens the protections the Act

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[9] Indeed, the dissenting judges in *Equilease*, per Davis, J., stated that the Fifth Circuit's decision there "overrules at least twenty-five years of established law in this circuit and creates serious practical problems in the enforcement of maritime liens." *Equilease*, 793 F.2d at 607 (Davis, J., dissenting).

is supposed to provide to suppliers of necessaries and, therefore, to the vessels themselves.

In *Piedmont*, the issue was whether coal had been supplied "to any vessel," 46 U.S.C. § 971, within the meaning of the Act, where the supplier had furnished coal to a company for use in both its factories and on its vessels. It was recognized that at common law such activity did not give rise to a maritime lien because the supply was for land-based as well as maritime uses. This Court's holding was that the coal supplier did not furnish coal to the vessel within the meaning of the Act and that, in enacting the FMLA, Congress had not intended to expand the maritime lien to reach such a situation. In this context, this Court reviewed Congress's three purposes in enacting the law—to abolish the foreign port / domestic port distinction, to abolish the exception for the owner's presence, and to unify the law of maritime liens. This Court then went on to describe the statute's effect:

> The act relieves the libelant of the burden of proving that credit was given to the ship when necessaries are furnished to her upon order of the owner, but in no way lessens the materialman's burden of proving that the supplies in question were furnished to her by him upon order of the owner or of some one acting by his authority.

Piedmont, 254 U.S. at 12. Nothing in this statement—or any other statement in *Piedmont*—holds or otherwise indicates that the Act merely creates a presumption of credit to the vessel that can be overcome by introducing evidence that the supplier relied on something other than the credit of the vessel. In *Piedmont*, this Court discussed the Act's alleviation of the burden of proving reliance on the credit of the vessel solely in connection with its explanation that the supplier still has the burden of showing that the supplies were furnished upon the order of someone having the authority to bind the vessel.

In sum, *Piedmont* does not support the holdings in *Equilease* or *Racal*. Far from it. In *Piedmont* the Court appears to reject, in further dicta, the rationale on which the Fifth Circuit relied:

> The fact found by the lower courts that the parties understood the law would afford a lien on the vessels . . . is, in this controversy, *without legal significance*. If the coal had been furnished to the several vessels by the libelant, maritime liens would have arisen and could have been established under the statute *without proof that credit was given to the vessels*.

254 U.S. at 10 (emphasis added). The decision below, however, faulted Racal for failing to provide evidence that Racal had intended to rely on the credit of the vessels, and instead, repeated the *Equilease* holding that the "idea of credit to the vessel [is] a prerequisite to a lien." (Pet'r App. 9a). This Court should review the *Racal* decision to correct this misreading of its precedent, eliminate the resulting confusion in the law, and reinstate the protection the FMLA provides to suppliers and vessels.

D. The Decision Below Is Inconsistent With This Court's Holdings On The Meaning Of "Furnished To The Vessel"

In the second issue on which the court below rested, the Fifth Circuit reached a decision on when necessaries are "provid[ed] . . . to a vessel" that presents an important holding that is inconsistent with this Court's rationales in *Piedmont* and *Dampskibsselskabet* and should also be reviewed. As noted above, the seismic equipment was not supplied exclusively to the first set of vessels in question, but instead was transferred by the charterer Coastline to other vessels owned by Tidewater. This, the Fifth Circuit held, was not the supply of necessaries "to a vessel," 46 U.S.C. § 31342(a) under the Act, and also defeated a lien. This

holding that the charterer's unilateral moving of necessaries from one vessel to another defeats a maritime lien is unprecedented; if it is permitted to stand, the result will be considerable uncertainty about the availability of maritime liens when necessaries are furnished to more than one vessel or moved from vessel to vessel—common activities.

The court of appeals pointed to *Piedmont* as "[t]he seminal case" on the meaning of the phrase in the Act "providing necessaries to a vessel," 46 U.S.C. § 31342. While this is correct, *Piedmont* provides no support for the Fifth Circuit's holding. Indeed, its rationale points in the opposite direction. In *Piedmont*, a coal company had supplied coal to a shipping company, which used the coal both in its factories and on its ships. The Court held that the coal company had supplied coal to the shipping company, and that the shipping company itself had furnished the coal both to its vessels and its non-maritime factories. On these facts, the Court held that the coal company did not supply necessaries to the vessels, and that no maritime lien was created. The Fifth Circuit also relied on its own decision, *Silver Star Enterprises, Inc. v. Saramacca MV*, 82 F.3d 666 (5th Cir. 1996), where the necessaries were cargo containers that, like the coal in *Piedmont*, "could be used intermodally on land as well as on numerous vessels." *Id.* at 669.

Thus, in *Piedmont* and *Silver Star*, the gravamen of the holding was that at the time of the supply that created the claim of a lien, the necessaries had both non-maritime and maritime uses, and that there had not been the identification of the supplies to vessels that is necessary to assure that a maritime lien was justified. In the present case, however, there was never any doubt that the equipment was supplied for use in vessels, because it was never put to a non-maritime use and indeed has no such use. And where there is no dispute that the necessaries in question have no non-maritime use, there is no reason to require that it be identified as for use

in specific vessels. The Act certainly does not impose this requirement. Instead, it states that a lien is created whenever a person furnishes necessaries "to a vessel." 46 U.S.C. § 31342.

The Fifth Circuit's holding that a lien arises only when the underlying agreement provides for delivery of the necessaries to specifically identified vessels rather than to vessels identified by a more general description also appears to be contrary to this Court's decision in *Dampskibsselskabet*. There, this Court described the agreement to provide the necessaries at issue as a "general contract to supply the fuel oil requirements of any and all vessels owned, chartered, or operated by" the charterer. *Dampskibsselskabet*, 310 U.S. at 276 (internal quotations omitted). The Court also observed that "the oil was supplied exclusively for the vessels in question, was delivered directly to the vessels and was so invoiced . . . ." *Id.* at 277. Although the "general" nature of the agreement to supply fuel oil to "any and all" of an unspecified (and possibly fluctuating) number of vessels was clearly known to the Court, the Court was not concerned that the failure of the agreement to identify specific vessels might preclude the existence of a valid lien. The clear result of the Court's discussion is that identification of the specific vessels to which the necessaries are to be provided is not important as long the necessaries are in fact furnished to the vessels contemplated by the contract.

The Fifth Circuit provided two reasons for its determination that *Dampskibsselskabet* did not control the present case. First, the court held that this Court's statements regarding furnishing necessaries to the vessels were dicta (Pet'r App. 15a), directed to an argument that the contract provisions demonstrated an intent to rely on the charterer's credit rather than that of the vessels, and that this Court did not address them to the issue of whether the supplier had furnished oil to the vessels. But this holding appears to be

incorrect and is itself in conflict with the decisions of at least two other courts of appeals, the Fourth Circuit and the Ninth Circuit. Both *Redcliffe Americas Ltd. v. M/V Tyson Lykes*, 996 F.2d 47, 50 (4th Cir. 1993) and *Foss Launch & Tug Co. v. Char Ching Shipping U.S.A., Ltd.*, 808 F.2d 697, 701-02 (9th Cir. 1987) characterized the disputed portion of *Dampskibsselskabet* as a holding on the issue of what constitutes the furnishing of necessities to a vessel.[10]

The Fifth Circuit also rejected the applicability of *Dampskibsselskabet* because, it asserted, the fact that Coastline had control over which vessels received the equipment renders the case more like *Piedmont* and *Silver Star* than like *Dampskibsselskabet*. But, as explained above, both of those cases involved the furnishing of necessaries that could be, and in fact were, used for non-maritime as well as maritime purposes. That was not true here. The confusion of the courts of appeals on this important issue and the need for this Court to elucidate its prior opinions show that this Court should grant review on this issue as well.

CONCLUSION

In sum, the Fifth Circuit's decision is based on a misreading of this Court's case law, conflicts with decisions other circuits have rendered, and undoes and sows confusion with respect to the reach and effect of the Federal Maritime Lien Act. This Court should grant certiorari to review and correct these errors and to reestablish uniformity in federal maritime law.

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[10] It is worthy to note that the courts of appeals whose decisions have resulted in the conflicts described here and in section A above—the First, Fourth, Fifth, Ninth, and Eleventh Circuits—represent the circuits where most of the major U.S. ports are located, and therefore most frequently decide significant issues of maritime law. Thus, inconsistency and lack of clarity are significant.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

Nos. 98-31382, 98-31383

RACAL SURVEY U.S.A., INC.;
NCS INTERNATIONAL, INC.,
Plaintiffs-Counter
Defendants-Appellees,

v.

M/V COUNT FLEET, her engines,
tackle, furniture & appurtenances in rem; *et al.*,
Defendants,

TIDEWATER MARINE INTERNATIONAL, INC.,
Counter Claimant-Appellant.

RACAL SURVEY U.S.A., INC.;
NCS INTERNATIONAL, INC.,
Plaintiffs,

v.

M/V COUNT FLEET, her engines,
tackle, furniture & appurtenances in rem, *et al.*,
Defendants,

TIDEWATER MARINE INTERNATIONAL, INC., INTERVENOR
Defendant-Appellant-Cross-Appellee,

v.

INPUT/OUTPUT, INC., INTERVENOR
Plaintiff-Appellee-Cross-Appellant.

Oct. 24, 2000

Appeals from the United States District Court
for the Western District of Louisiana

Before EMILIO M. GARZA, DeMOSS and STEWART, Circuit Judges.

DeMOSS, Circuit Judge:

In these consolidated appeals, Tidewater Marine International, Inc., ("TMI") primarily challenges two of the district court's rulings arising out of an admiralty dispute. First, TMI argues that the district court erred in finding a maritime lien in favor of Racal Survey U.S.A., Inc., and NCS International, Inc., (collectively "Racal") over various vessels chartered by Coastline Geophysical, Inc., ("Coastline") from TMI. Second, TMI maintains that the district court improperly denied TMI a maritime lien over certain seismic equipment sold by Input/Output, Inc., ("Input") to Coastline.

Because Racal did not rely on the credit of the arrested vessels or provide any necessaries to those boats, we reverse the district court's judgment granting a maritime lien in favor of Racal. We, however, conclude that the district court did not err with respect to its ruling denying TMI a maritime lien over the seismic equipment sold by Input and, therefore, affirm the district court's ruling on that issue.

I. BACKGROUND

On February 16, 1996, Coastline entered into a Blanket Time Charter Agreement ("First Charter") with Tidewater Marine, Inc., ("Tidewater Marine").[1] According to that charter, Tidewater Marine was to provide vessels suited for

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[1] Tidewater Marine is a sister company of TMI. Both Tidewater Marine and TMI are subsidiaries of Tidewater, Inc. ("Tidewater"). Tidewater Marine operates vessels in domestic waters while TMI operates vessels in foreign waters. Neither Tidewater Marine or Tidewater is a party to this litigation.

offshore activities in the mineral and oil industry. Those vessels were to embark on a seismic expedition in the Gulf of Mexico in search of oil and gas. In conformance with the First Charter, on March 11, 1996, the two parties executed separate letter agreements for four vessels: 1) the M/V CAMERON SEAHORSE, 2) the M/V WHITTIE TIDE, 3) the M/V TAYLOR TIDE, and 4) the M/V TOUPS TIDE.

To do its seismic operations, Coastline required certain technical equipment. As a result, it made various inquiries to Racal, who submitted a proposal to Coastline on February 12, 1996. That proposal outlined the equipment to be leased and the services to be rendered to Coastline for its operations. Furthermore, Racal submitted another proposal on March 25, 1996, which pertained to the sale of certain other equipment to Coastline. On March 27, 1996, Racal shipped all of the required equipment to the shipyard for installation. The equipment would allow the four vessels to coordinate information among themselves to better facilitate the search for oil and gas. Two of the vessels would lay cable upon the ocean floor while a third, the source vessel, would send information along the cable via airgun shots from caterpillar machinery located on the vessel. A fourth vessel would record the data generated from these airgun shots. In addition to Racal's equipment, other equipment provided by Input was installed on the chartered vessels.

After the First Charter terminated, Coastline executed a second Blanket Time Charter ("Second Charter") on August 13, 1996. Although similar in nature to the earlier charter agreement, the Second Charter differed in three respects: 1) TMI, not Tidewater Marine, was the vessel owner; 2) four different vessels would be used; and 3) the seismic operations would be conducted off the coast of Africa, not in the Gulf of Mexico. On August 19, 1996, Coastline again agreed to separate letter agreements for four vessels: 1) the M/V SECRETARIAT, 2) the M/V COUNT FLEET, 3) the M/V COUNT TURF, and 4) the M/V MILTON TIDE.

Between August 28, 1996, and September 2, 1996, the equipment that had been placed onto the First Charter vessels was transferred to the four new vessels at Quality Shipyards, a subsidiary owned by Tidewater.

When the Africa survey concluded, the four vessels chartered for that trip sailed to Trinidad and Tobago for another job. During that voyage, the charter between Coastline and TMI terminated due to non-payment of charter hire, but Coastline's equipment remained on board. Besides failing to pay TMI, Coastline became insolvent and defaulted on its payments to Racal and Input.[2] Upon the return of the Second Charter vessels to the United States, Racal arrested three of them. TMI secured the release of the vessels and removed and stored Coastline's equipment. Shortly thereafter, TMI arrested Coastline's equipment, in some of which Input claimed a UCC security interest, because of Coastline's non-payment of charter hire.

In district court, Racal filed a motion for partial summary judgment requesting determination of the validity of its lien under the Federal Maritime Lien Act ("FMLA"), 46 U.S.C. § 31342. TMI opposed that motion and filed a cross-motion for summary judgment. After taking the motions under advisement, the district court ruled in favor of Racal. Moreover, the district court granted Input's "Application for Petitioner to Show Cause Instanter or, Alternatively, Motion for Summary Judgment" and denied TMI's motion for summary judgment seeking recognition of its claimed maritime lien in the Coastline equipment.

TMI now appeals both of those rulings.

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[2] With respect to Coastline's obligations to Input, they derived from Coastline's failure to pay First Interstate Bank ("First Interstate"), which had financed Coastline's purchases from Input. Input had guaranteed those purchases, and after Coastline's default to First Interstate, Input paid those obligations and took the place of First Interstate.

II. STANDARD OF REVIEW

We review a grant or denial of summary judgment de novo. *See Webb v. Cardiothoracic Surgery Assocs., P.A.*, 139 F.3d 532, 536 (5th Cir.1998). Summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits filed in support of the motion, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *See* Fed.R.Civ.P. 56(c). The summary judgment evidence is reviewed in the light most favorable to the nonmovant. *See Melton v. Teachers Ins. & Annuity Ass'n*, 114 F.3d 557, 559 (5th Cir.1997). If the moving party meets its initial burden of showing that there is no genuine issue, then the burden shifts to the nonmovant to set forth specific facts showing the existence of a genuine issue. *See* Fed.R.Civ.P. 56(e). The nonmovant cannot satisfy his summary judgment burden with conclusional allegations, unsubstantiated assertions, or only a scintilla of evidence. *See Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir.1994) (en banc). If the nonmovant fails to respond, then summary judgment, if appropriate, shall be entered against that party. *See* Fed.R.Civ.P. 56(e).

III. DISCUSSION

Both of TMI's appeals involve the concept of a maritime lien, a device developed as a necessary incident to the operation of vessels. *Piedmont & George's Creek Coal Co. v. Seaboard Fisheries Co.*, 254 U.S. 1, 41 S.Ct. 1, 3, 65 L.Ed. 97 (1920). Because a ship moves from place to place, it is peculiarly subject to vicissitudes that would compel abandonment of vessel or voyage, unless repairs and supplies are promptly furnished. *Id.* Moreover, a ship is often absent from her home port without access to funds and, as a result, must be able to obtain upon her own account needed repairs and supplies. *Id.* That and the resulting need to ensure that a

ship did not sail away from its debts contributed to the creation of the maritime lien. *See Equilease Corp. v. M/V SAMPSON*, 793 F.2d 598, 602 (5th Cir.1986) (en banc).

Prior to 1910, however, a maritime lien was hardly a certainty for the supplier of necessaries because the law was full of exceptions. *Gulf Oil Trading Co. v. M/V CARIBE MAR*, 757 F.2d 743, 747 (5th Cir.1985). To remedy that situation, Congress in 1910 enacted the Federal Maritime Lien Act ("FMLA"), 46 U.S.C. §§ 971-975,[3] to bring a degree of uniformity to the area of maritime liens. *Id.* The FMLA essentially preempted the various state statutes with respect to the conferral of maritime liens for repairs, supplies, and other necessaries. Equilease, 793 F.2d at 602-03. And it eliminated the distinction that had been drawn between a vessel in her home port and a vessel in a foreign port. *Id.* Before the FMLA, a lien could be given for necessaries furnished to a vessel in a port of a foreign state if the necessaries were furnished upon the credit of the vessel, but no such lien could be given for necessaries furnished in a vessel's home port or state. *Id.*

Section 971 of the FMLA provided a maritime lien to "any person furnishing repairs, supplies, towage, use of dry dock or marine railway, or other necessaries, to any vessel, whether foreign or domestic, upon the order of the owner of such vessel, or of a person authorized by the owner," and it further stated that the furnishing person need not "allege or prove that credit was given to the vessel." 46 U.S.C. § 971 (superseded 1988). Section 972 created a presumption that the managing owner, ship's husband, master, or any person to whom the management of the vessel at the port of supply was intrusted had authority to procure necessaries. Section 973 added to the individuals presumed to have authority to procure necessaries under § 972, including those officers and agents

[3] Congress superseded that prior version of the FMLA in 1988 and recodified much of it at 46 U.S.C. §§ 31341-31343.

appointed by a charterer, by an owner pro hac vice, or by an agreed purchaser in possession of the vessel. Although that section broadened the group of individuals presumed to have authority to procure necessaries, it also placed a significant limitation and duty upon the supplier of necessaries. Under § 973, if the furnisher knew, or by exercise of reasonable diligence could have ascertained, that because of the terms of a charter party, agreement for sale of the vessel, or for any other reason, the person ordering repairs, supplies, or other necessaries was without authority to bind the vessel, then a maritime lien could not attach. In 1971, Congress deleted the "exercise of reasonable diligence" language because that language had severely hampered suppliers' ability to obtain a maritime lien.[4] *Gulf Oil*, 757 F.2d at 747-48. As for § 974, that section pertained to a furnisher's ability to waive its right to a maritime lien by agreement or otherwise.

In 1988, Congress superseded the prior version of the FMLA and enacted new provisions primarily at 46 U.S.C. §§ 31341-31343.[5] *See Silver Star Enters., Inc. v.*

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[4] Congress also deleted the reference to knowledge of a prohibition of lien clause as creating a bar to the formation of a maritime lien. *See Gulf Oil*, 757 F.2d at 748. In Gulf Oil, however, we concluded that the deletion of that language did not signify any Congressional desire to render prohibition of lien clauses completely ineffectual and held that actual knowledge could still bar a maritime lien. *See id.* at 749.

[5] FN5. Section 31341 provides in pertinent part:

(a) The following persons are presumed to have authority to procure necessaries for a vessel:

(1) the owner;

(2) the master;

(3) a person entrusted with the management of the vessel at the port of supply; or

(4) an officer or agent appointed by—

(A) the owner;

(B) a charterer;

SARAMACCA MV, 82 F.3d 666, 668 n. 2 (5th Cir.1996). The most significant change was that Congress included a definition for "necessaries." *See* 46 U.S.C. § 31301(4). Section 31301(4) states that "'necessaries' includes repairs, supplies, towage, and the use of a dry dock or marine railway." In the prior version of the FMLA, "necessaries" was not defined, but its meaning could be derived from the context of § 971, which stated that a maritime lien could be received for furnishing "repairs, supplies, towage, use of dry dock or marine railway, or other necessaries." Although § 31301(4) enumerates specific kinds of "necessaries," Congress did not intend to make any substantive change to the law. *See* H.R.Rep. No. 100- 918 (1988), U.S.Code Cong. & Admin. News 1988, 6104. Indeed, besides some other minor changes in language, such as replacing the term "furnishing" with the word "providing," little changed substantively. *See, e.g., Silver Star*, 82 F.3d at 668 n. 2; H.R.Rep. No. 100-918. Accordingly, much of the case law remains persuasive, if not controlling.

With that history in mind, we now review each of the claimed maritime liens.

A. *Racal v. TMI*

In appealing the district court's judgment finding a maritime lien in favor of Racal over the four vessels used during the Second Charter, TMI raises several arguments to

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(C) an owner pro hac vice; or

(D) an agreed buyer in possession of the vessel.

Section 31342 reads in pertinent part:

(a) . . . [A] person providing necessaries to a vessel on the order of the owner or a person authorized by the owner

(1) has a maritime lien on the vessel;

(2) may bring a civil action in rem to enforce the lien; and

(3) is not required to allege or prove in the action that credit was given to the vessel.

support reversal. Because TMI most adamantly contends that Racal does not have a lien over the vessels because Racal did not rely on the credit of the vessels, we address that argument first.

Subsection 31342(a)(3) provides that a person providing necessaries to a vessel "is not required to allege or prove . . . that credit was given to the vessel." The prior version of the FMLA contained a similarly worded statement at § 971. In construing that prior version, the Supreme Court held that the relevant language only served to remove from the supplier the burden of proving that it relied on the credit of the vessel. *See Equilease*, 793 F.2d at 605 (interpreting Piedmont). That is, we must presume that the supplier relied on the credit of the vessel.

The FMLA may have created a presumption of credit based on the vessel, but it did not do away with "the idea of credit to the vessel being a prerequisite to a lien, and the concomitant principle that credit to the owner negates the lien." *Id.* Because under the FMLA a presumption arises that one providing supplies to a vessel acquires a maritime lien, the party attacking the presumption must establish that the personal credit of the owner or the charterer was solely relied upon. *Id.* "To meet this burden, evidence must be produced that would permit the inference that the supplier purposefully intended to forego the lien." *Id.*

TMI argues that it satisfied that burden and complied with Fifth Circuit case law, as stated in Equilease. For support, it points to testimony by Richard Pender, Racal's president:

> Q: So you weren't relying on credit of Tidewater or any of its vessels when you were entering into this contract with Coastline?
>
> . . .
>
> A: Yeah, I mean, our contract was with Coastline. That was our customer.
>
> . . .

Q: At the time of contracting with Coastline, you weren't looking to Tidewater or any of its vessels for payment of Coastline's contract with NCS?

. . .

A: I had no contract with Tidewater.

Q: You had no dealings with Tidewater whatsoever?

A: No. I had no—no.

Racal counters that Pender's testimony does not aid TMI's position that Racal intended to forego a maritime lien because the testimony does not specifically indicate that Racal planned to waive the lien and rely solely on the credit of a party other than the vessel. According to Racal, Equilease and the cases preceding it held that a party opposing the maritime lien has the burden to prove that the supplier looked solely to a party's personal credit. *See Equilease*, 793 F.2d at 606; *see also Point Landing, Inc. v. Alabama Dry Dock & Shipbuilding Co.*, 261 F.2d 861, 867 (5th Cir.1958); *Sasportes v. M/V SOL DE COPACABANA*, 581 F.2d 1204, 1209 (5th Cir.1978) (quoting Point Landing). Because Pender's testimony does not state that Racal looked solely to Coastline or some entity other than the vessels, Racal contends that TMI has failed to rebut the presumption.

In Equilease, a financing corporation instituted foreclosure proceedings on the preferred mortgages of three chartered vessels. Equilease, 793 F.2d at 600. The charterer's insurance broker intervened in the proceedings, attempting to recover for the vessels' unpaid insurance premiums. *Id.* Among other things, the insurance broker claimed a maritime lien under the FMLA for the insurance. *Id.* The financing corporation charged that insurance did not constitute a necessary for purposes of the FMLA. *Id.* Sitting en banc, we held that insurance constituted a necessary but that the insurance broker failed to meet the statutory requirement of reliance on the credit of the vessel when furnishing the insurance. *Id.* at 607.

In determining that the insurance broker did not rely on the credit of the vessel, we specifically noted two items from the record. First, it referred to the testimony of a former manager of the insurance broker. That testimony revealed that the insurance broker looked solely to the charterer, the financing corporation, or another party other than the vessels.

> Q: So you are saying you relied only on Dunnamis, Equilease, and/or Eltra, is that a fair statement?
>
> A: That's a fair statement.

Id. at 606. Second, we found a statement in the insurance broker's initial appellate brief admitting to sole reliance on a party other than the vessels. In that brief, the insurance broker stated, "The Unilease Companies were totally funded for the operations of the Vessels by Equilease and it was the credit of Equilease upon which all parties placed total reliance." *Id.*

In light of the fact that the insurance broker appeared to rely solely on the credit of entities other than the vessels, the judgment in Equilease was in keeping with prior Fifth Circuit case law. But we also concluded in Equilease that "in the absence of reliance-intention, by presumption, or otherwise-there is no right to claim a lien." *Equilease*, 793 F.2d at 606 n. 9. Thus, we held that by deliberately choosing not to rely on the credit of a vessel, a supplier, as a matter of law, purposefully intends to forego its right to claim a maritime lien. *Id.*

Here, TMI does not point to any evidence directly indicating that Racal intended solely to look towards Coastline or some party other than the vessels for payment, although some items in the record do suggest such a posture.[6]

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[6] For example, Racal forwarded a promissory note to Coastline to finance the purchase of a computer system. In addition, Racal's lease proposal to Coastline states that Racal would submit itemized bills to Coastline and that Coastline had to make payment within 30 days. Of

But Pender's testimony clearly indicates that Racal did not rely on the credit of the vessels. Almost nothing is more conclusive than such testimony as to whether there was reliance. Not even testimony that Racal looked solely to another party for payment better demonstrates that Racal did not provide the supplies on the credit of the vessels. When evidence reveals that a supplier looked solely to a party other than a vessel for payment, we are persuaded that the supplier was not relying on the credit of the vessels because of the logical inference that can be derived from that evidence. In the instant case, we need not trouble ourselves with any inference as the evidence is directly on point. Accordingly, consistent with Equilease, because the testimony explicitly shows that Racal deliberately chose not to rely on the credit of the four chartered vessels, as a matter of law, Racal purposefully intended to forego its maritime lien.[7] *See id.*

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course, neither piece of evidence is sufficient to demonstrate that Racal solely relied on Coastline's credit. *See Point Landing*, 261 F.2d at 867.

[7] The two other cases cited by Racal in its brief, Point Landing and Sasportes, do not sway our view. First, given any conflict between those two cases and Equilease, the latter controls as an en banc decision. Second, in neither Point Landing or Sasportes was there direct evidence indicating that the supplier did not rely upon the credit of the vessel. Rather, in both cases, the sole reliance element was emphasized to demonstrate the lack of evidence supporting the view that the supplier had not relied on the credit of the vessel. If a supplier solely relied on the credit of a party other than the vessel, then the only logical inference would be that the supplier did not rely on the credit of the vessel. But acceptance of a mortgage or a promissory note by the supplier, as was the case in Point Landing, does not inexorably lead to the conclusion that the supplier relied solely on the credit of a party other than the vessel or that the supplier did not rely on the credit of the vessel. *See Point Landing*, 261 F.2d at 867. In the present case, we do not just have evidence of a mortgage or a promissory note, but specific testimony that Racal did not rely upon the credit of the vessels.

But even if Racal had relied upon the credit of the vessels, TMI insists that a maritime lien could not have attached because the equipment and services, which allegedly were necessaries, were not provided to the vessels. Under § 31342, a supplier of necessaries must provide those goods or services to a vessel to receive a maritime lien. Likewise, under § 31342's predecessor statute, a supplier had to furnish necessaries to a vessel to receive the benefits of a lien. *See* 46 U.S.C. § 971 (superseded 1988). As previously noted, the change in terms did not materially alter the law, and we have continued to rely on case law preceding the recodification to interpret the current statute. *See, e.g., Silver Star*, 82 F.3d at 668-69.

The seminal case in this area is the Supreme Court's decision in *Piedmont & George's Creek Coal Co. v. Seaboard Fisheries Co.*, 254 U.S. 1, 41 S.Ct. 1, 65 L.Ed. 97 (1920). In that case, a coal company sought a maritime lien on several vessels that had utilized the coal company's coal. See Piedmont, 41 S.Ct. at 2. Under the arrangement between the coal company and the vessels' prior owner, the coal company agreed to furnish such coal as would be required to operate the vessels and the factories of the vessels' prior owner. *Id.* No coal was delivered directly to the vessels, and there was no reference on any invoice to the vessels. *Id.* at 2. Instead, the coal was loaded onto barges, towed to the factories, and then placed in bins to commingle with coal from sources other than the coal company. *Id.* Partly due to those facts, the Supreme Court concluded that the coal company had not furnished the coal to the vessels and that the vessels' prior owner had actually furnished the coal. *Id.* at 4.

Relying on Piedmont and other circuit's interpretations of § 31342, we recently declined to extend coverage of the FMLA to bulk cargo containers leased to vessel owners or charterers. *See Silver Star*, 82 F.3d at 667. In Silver Star, a cargo container company provided nearly 120 cargo

containers to a shipper that owned and/or chartered several vessels. *Id.* When a preferred mortgagee sought to enforce its mortgages against two of the shipper's vessels, the cargo container company intervened, claiming maritime lien rights arising from the lease of the containers. *Id.* We found no such rights because the cargo container company provided the containers to the shipper, not to the vessels. *Id.* at 669. The lease did not earmark particular containers for service on particular vessels. *Id.* at 667. The shipper had ultimate authority as to which vessels the containers were going to be placed. *Id.* at 669. And neither the shipper or the cargo container company knew aboard which ship a particular container would be placed at any given time. *Id.*

Despite Piedmont and Silver Star's misgivings about the extension of maritime liens to situations where necessaries were not apparently designated for specific vessels, the district court ruled that Racal had provided necessaries to the four chartered vessels. In so holding, the district court cited as support another Supreme Court case, *Dampskibsselskabet Dannebrog v. Signal Oil & Gas Co.*, 310 U.S. 268, 60 S.Ct. 937, 84 L.Ed. 1197 (1940). There, an oil company contracted with a shipping company to sell fuel oil to the "vessels owned, chartered, or operated by W.L. Comyn & Sons." *Id.* at 938. Later, two vessels were chartered to W.L. Comyn & Sons, and the oil company supplied them with fuel oil. *Id.* Ultimately, the oil company libeled the two vessels for fuel oil supplied to the vessels on the charterer's orders. *Id.* at 939. In acknowledging that a maritime lien could be asserted against the vessels, the Supreme Court referred to Piedmont and noted that "the oil was supplied exclusively for the vessels in question, was delivered directly to the vessels and was so invoiced." *Id.* at 942. Comparing that statement with the facts in the instant case, the district court found that Racal delivered the seismic equipment directly to the vessels.

We believe that was error. Although the *Dampskibsselskabet* court stated that "the oil was supplied exclusively for the vessels in question, was delivered directly to the vessels and was so invoiced" in response to the vessels' owners' contention that Piedmont precluded a maritime lien from attaching, the owners did not raise the Piedmont case to contest whether the oil company had furnished the oil to the vessels. Rather, the owners pressed Piedmont because that case, like theirs, involved a general contract to supply a necessary, and they thought that Piedmont somehow affected the issue of whether the oil company had supplied oil upon the charterer's credit and not upon the credit of the vessels. That is, the holding of *Dampskibsselskabet* did not actually pertain to whether the oil company had provided fuel oil to the vessels.

Assuming, though, that the *Dampskibsselskabet* court's statement was not dicta, we still conclude that the district court erred in finding that Racal provided the seismic equipment and services to the vessels.[8] Contrary to *Dampskibsselskabet*, Racal did not supply the equipment and services exclusively for the four Second Charter vessels. Indeed, Racal and Coastline entered into several agreements with respect to the services and the leased and sold equipment months before the Second Charter vessels were ever selected. Racal cannot fairly say that the alleged necessaries were exclusively provided to the Second Charter vessels when the equipment, and the attendant services, was first procured to be placed in unnamed vessels that were later designated as the First Charter vessels. The equipment was sold or leased to Coastline, which had control over which vessels the equipment was to be placed. Subsequent to the Gulf of

[8] The district court also found as important the fact that the seismic equipment was installed at a shipyard that is a subsidiary of TMI's mother corporation. We do not find that fact to be determinative in reaching our conclusion.

Mexico operation, Coastline merely transferred the equipment, and the attendant services, to the Second Charter vessels. Accordingly, we believe that the instant case more closely parallels the situations confronted in Piedmont and Silver Star and conclude that Racal's equipment and services were not provided to the vessels.

Because Racal did not provide the equipment and services, which constituted the alleged necessaries, to the vessels and because Racal deliberately chose not to rely on the credit of the four chartered vessels, we find that the district court erred in granting Racal's summary judgment motion claiming a maritime lien in TMI's Second Charter vessels.[9] Therefore, we reverse and remand for proceedings consistent with this opinion.

B. *TMI v. Input*

TMI's other issue on appeal concerns the district court's ruling denying TMI a maritime lien over Coastline's equipment despite Coastline's breach of the charter for non-payment. The district court orally held that Coastline's equipment was not cargo and declined to extend the concept of a maritime lien to items other than cargo. In challenging the district court's decision, TMI contends that a general maritime lien may be asserted for breach of a charter and that, in any case, Coastline's equipment was cargo.

Maritime liens are stricti juris and will not be extended by construction, analogy, or inference. Piedmont, 41 S.Ct. at 4. Moreover, they are largely statutorily created. *See Lake Charles Stevedores, Inc. v. PROFESSOR VLADIMIR POPOV MV*, 199 F.3d 220, 224 (5th Cir.1999), cert. denied,—U.S.—, 120 S.Ct. 2006, 146 L.Ed.2d 956 (2000). Thus, to determine the validity of a maritime lien, we must normally refer to

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[9] TMI raised two other arguments in support of reversal. In light of our holding, we need not address those arguments.

statutory law or those liens that have been historically recognized in maritime law. *Id.*

Here, TMI's claimed maritime lien clearly does not come within the province of the FMLA. As for non-statutory maritime law, TMI has been unable to uncover a single case directly on point that suggests that a shipowner may assert a maritime lien against the charterer for items that are not cargo. The cases cited by TMI are inapposite and actually concern maritime liens in favor of the charterer against the boat owner. *See E.A.S.T., Inc. v. M/V ALAIA*, 876 F.2d 1168 (5th Cir.1989); *International Marine Towing, Inc. v. Southern Leasing Partners, Ltd.*, 722 F.2d 126 (5th Cir.1983). Nor do those cases extend a maritime lien to items other than cargo for breach of a charter. The lack of precedential authority and the stricti juris nature of a maritime lien are damning to TMI's cause, and we conclude that TMI's attempt to extend the concept of a maritime lien is unavailing.

With respect to TMI's other contention that Coastline's equipment was cargo, we find no error on the part of the district court. The evidence clearly indicates that TMI differentiated between cargo and Coastline's equipment. Furthermore, unlike cargo, much of Coastline's equipment had to be installed onto the vessels. Accordingly, we affirm the district court's judgment denying TMI a maritime lien over Coastline's equipment.

IV. CONCLUSION

For the foregoing reasons, we reverse the district court's judgment granting a maritime lien to Racal and remand for proceedings consistent with this opinion. As for the district court's judgment denying TMI a maritime lien on Coastline's equipment, we affirm.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

[Filed Oct 26, 1998]

CIVIL ACTION
CONSOLIDATED NO. 97-1628
JUDGE HAIK
MAGISTRATE JUDGE METHVIN

RACAL SURVEY U.S.A., INC., *et al.*

Versus

M/V COUNT FLEET, *et al.*

CIVIL ACTION
CONSOLIDATED NO. 97-1692
JUDGE HAIK
MAGISTRATE JUDGE METHVIN

TIDEWATER MARINE INTERNATIONAL, INC.

Versus

TWO HIGH PRESSURE AIR
COMPRESSORS, ETC. *et al.*

CIVIL ACTION
CONSOLIDATED N0. 97-1668
JUDGE HAIK
MAGISTRATE JUDGE METHVIN

TIDEWATER MARINE INTERNATIONAL, INC.

Versus

THAT CERTAIN SEISMIC EQUIPMENT, ETC.

RULING

Pending before the Court is Plaintiffs', Racal Survey U.S.A. and N.C.S. Intl. Inc., hereafter referred to as Racal/NCS, Motion for Partial Summary Judgment pursuant to Federal Rule of Civil Procedure 56. The Motion was properly filed with the Clerk of Court for the Western District of Louisiana on March 5, 1998. Consolidated Plaintiff, Tidewater Marine Intl., hereafter referred to as Tidewater, filed their own Motion and Memorandum for Summary Judgment that also contained an Opposition to Racl/NCS' Motion for Partial Summary Judgment on July 9, 1998. Plaintiff, Racal/NCSfiled a Memorandum in Opposition to Tidewater's Motion for Summary Judgement on July 23, 1998. Also on July 23, 1998, Plaintiff filed a Motion to Strike the Affidavit of Keith Jones . On August 6, 1998, Tidewater filed a memorandum in opposition to Plaintiffs Motion to Strike. [137-1]

After a thorough review of both Motions for Summary Judgment, and the Oppositions thereto, and for reasons contained herein, Plaintiffs' Motion for Summary Judgment is GRANTED. Consolidated Plaintiff's Motion for Summary Judgement is DENIED. Also, Plaintiffs Motion to Strike the Affidavit of Keith Jones [12-1] is GRANTED.

FACTS

The facts pertinent to the resolution of the pending motion are as follows. On February 16, 1997, Tidewater entered into a Blanket Time Charter Agreement with Coastline Geophysical. According to the Time Charter, Tidewater was to provide to Coastline four vessels suited for offshore activities in the mineral and oil industry. Subsequent to the first charter, N.C.S. installed various seismic equipment and computer equipment aboard the four vessels that Coastline had chartered from Tidewater. Following the installation of the equipment, the four vessels embarked on a seismic

expedition in the Gulf of Mexico in search of oil and natural gas. The equipment that N.C.S. provided to Coastline basically allowed the four vessels to coordinate information amongst themselves in order to better facilitate their search for oil and gas. The first two vessels laid cable upon the ocean floor. A third vessel, the source vessel, sent information along the cable via airgun shots from caterpillar machinery located on the vessel. The fourth vessel recorded data generated from these airgun shots.

On August 14, 1997, Coastline chartered four different vessels from Tidewater. These vessels, the M/V SECRETARIAT, MN COUNT FLEET, MN COUNT TURF, AND M/V MILTON TIDE were chartered out for seismic exploration in Africa. The motions for summary judgements filed by both sides pertain to these four vessels.

Following the second charter, the N.C.S. equipment used on the first expedition in the Gulf of Mexico was placed on the M/V SECRETARIAT, M/V COUNT FLEET, MV COUNT TURF, AND M/V MILTON TIDE at Quality Shipyards, a subsidiary owned by Tidewater. Also Racal Survey supplied equipment that would receive positioning correction data. This data would then be transferred by the Racal Survey equipment to the N.C.S. computer system aboard each recorder vessel. The African expedition, like the Gulf expedition, involved coordination of information among the four vessels in their search for oil and gas. Relying on information generated from N.C.S. equipment, two of the vessels laid cable. A third vessel, the source vessel, sent information along the cable via airgun shots from caterpillar machinery . The fourth vessel recorded data generated from these airgun shots. The data collected from these seismic operations would then be analyzed. This analysis was supposed to help better predict the presence of oil and natural gas.

Coastline, now defunct, was not able to meet the obligations it owed to N.C.S. and Racal for the use of said equipment; therefore, together, they have filed a motion for partial summary judgement claiming a valid maritime lien on said vessels.

SUMMARY JUDGMENT

A. Applicable Law

Under Rule 56 of the Federal Rules of Civil Procedure, summary judgment shall be granted where:

> the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

No genuine issue of material fact exists "where the record as a whole could not lead a rational trier of fact to find for the nonmoving party." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-24, 106 S.Ct. 2548, 2552-53, 91 L.Ed.2d 265 (1986). The burden of proof as to the lack of genuine issue of fact is on the moving party, and a court should not grant summary judgment unless convinced that there is no evidence to sustain a recovery under any circumstances.

In determining the existence of such genuine issues of material fact, this Court must view the record in a light most favorable to the nonmoving party and must give that party the benefit of all reasonable inferences to be drawn from the facts. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348, 1356-57, 89 L.Ed.2d 538 (1986). Thus, summary judgment is inappropriate where there is a genuine disagreement as to the reasonable inferences to be drawn from undisputed facts, *Xerox Corp. v. Genmoora Corp.* 888 F.2d 345, 352 (5th Cir. 1989), or when the summary judgment evidence is subject to conflicting

interpretations. *Field v. City of South Houston, Tex.* 922 F.2d. 1183, 1191 (5th Cir. 1991).

Although, as noted previously, the burden of proof as to the lack of a genuine issue of material fact is on the moving party, the moving party may shift this burden by showing an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. at 325, 106 S.Ct. At 2553-54; *Lavespere v. Niagara Machine & Tool Works, Inc.* 910 F.2d 167, 178 (5th Cir. 1990). The burden then shifts to the nonmoving party who must come forward with evidence to support his claim. *Id.* To establish the sufficiency of the evidence, the nonmover must "go beyond the pleadings" and designate facts to support each element of the cause of action, showing that there is a genuine issue of material fact. *Id.* The Court must not weigh evidence on summary judgment. *Anderson v. Liberty Lobby. Inc.*, 477 U.S. 242, 249, 106 S.Ct. 2505, 2510-11, 91 L.Ed.2d 202 (1986); *Amburgey v. Corhart Refractories Corp. Inc.*, 936 F.2d. 805, 809 (5th Cir. 1991). The movant is entitled to all reasonable and justifiable inferences from the evidence submitted. *Anderson v. Liberty Lobby. Inc.*, 477 U.S. at 255, 106 S.Ct. At 2513-14.

B. Parties' Contentions

Pursuant to Federal Rule of Civil Procedure 56, Plaintiff's have filed the instant Partial Motion for Partial Summary Judgment. In support of the Partial Motion for Summary Judgment, Racal/NCS contend that they possess a valid maritime lien pursuant to the Maritime Lien Act (the Act). RacalINCS claim that the equipment that they provided were necessaries as defined by the Act and that Coastline, as a charterer, had the legal authority to bind the aforementioned vessels to a maritime lien. Racal/NCS further contend that because they provided necessaries to the vessel on the order of a person authorized by the owner, it has a right to enforce

the lien without having to prove that credit was given to the vessel rather than to Coastline.

Tidewater claims they are entitled to summary judgement because Racal/NCS do not possess a lien on Tidewater vessels. Tidewater contends that four requirements must be met for there to be a valid maritime lien under the Act:

1. The goods or services must be necessaries to the vessel;
2. The goods or services must be provided to a vessel,
3. The goods or services must be provided on the order of the owner; and
4. The goods or services must be provided on the credit of the vessel rather than on the personal credit of the owner or charterer.

46 U.S.C. § 31342; *Eguilease corp. v. M/V Sampson*, 793 F.2d 593 (5th Or. 1986).

Tidewater claims that the goods and services were provided on the credit of coastline. In support of this contention, Tidewater points to the deposition testimony of Philip Garrod who was Racal/N.C.S.'s Vice President of Operations. Excerpts from the relevant part of the deposition are as follows:

Q. Did you expect to be paid by coastline?

A. Yes.

Q. Did you expect to be paid by Tidewater?

A. No.

(Exh. E, depo. of Garrod, p. 145).

Tidewater also asserts that the affidavit submitted by Keith Jones, coastline's former President, confirms the assertion

that Racal did not rely on the credit of the vessels. (Exh. F affid. of Jones). The affidavit reads in part as follows:

> NCS International relied solely on the credit of Coastline Geophysical, Inc.
>
> * * *
>
> NCS International Inc. Did not rely upon the credit of any vessels which would be chartered by Coastline.

Racal/NCS has filed a Motion to Strike the affidavit of Jones claiming that the affidavit is not based on personal knowledge, constitutes hearsay, and is solely made up of conclusory allegations. Tidewater urges that Jones' presence at negotiation meetings between Racal/NCS and coastline demonstrates that he has personal knowledge as to the intentions of Racal/NCS regarding the issue of reliance.

Also, Tidewater asserts that the goods and services were not vessel necessaries and were not provided to the vessels within the meaning of the Act. Tidewater contends that the goods and services were provided to coastline and not to the vessels themselves. Tidewater claims that no statutory lien exists when the goods or services are provided to the owner or charterer for use at its discretion instead of to a specific vessel. *Silver Star Enterprises, Inc. v. M/V Saramacca*, 82 F. 3d 666 (5th Cir. 1996). Tidewater claims that since Coastline retained authority to place the equipment on the vessels of their choice, no valid maritime lien exists. (Exh. P, Racal/NCS February 1996 Proposal and contract; Exh. E, depo. of Garrod, p. 35-36).

ANALYSIS

46 U.S.C. § 31342 (a) (Supp.1998) states that a person providing necessaries to a vessel on the order of the owner or a person authorized by the owner-

(1) has a maritime lien on the vessel;

(2) may bring a civil action in rem to enforce the lien; and

(3) is not required to allege or prove that credit was given to the vessel.

There are three issues that need to be resolved in the current matter. The first issue is whether or not coastline was a charterer under the meaning of the Act and whether or not they had the authority to procure necessaries for the vessels. The second issue is whether the equipment and services were necessaries under the meaning of the Act. The third issue is whether these necessaries were provided directly to coastline rather than to said vessels.

In order to resolve the first issue of whether coastline had the authority to procure necessaries for the vessels, the nature of the relationship between coastline and Tidewater must be determined. As stated earlier, coastline and Tidewater entered into two Time charter contractual agreements. The terms of both contacts named coastline as a charterer of vessels owned by Tidewater. Under the Maritime Lien Act, a charterer of a vessel is one who becomes entitled to use of whole of whole of vessel belonging to another (owner) as a result of charter agreement. 46 U.S.C. § 31341. In *Trico Marine Operations. Inc. v. Falcon Drilling Co.*, 116 F. 3d 159, 161 (5th Cir. 1997), the court characterized an agreement in which the owner provided a vessel, crew, and equipment to another party as a charter under the meaning of the Act. According to the terms of the Time Charters between Tidewater and Coastline, Tidewater would provide the vessel, crew and equipment to Coastline; therefore, the contract for the use of the Tidewater vessels by Coastline demonstrates that Coastline was a charterer under the meaning of the Act. A charterer is presumed to have the authority to procure necessaries for a vessel. 46 U.S.C. § 31341. To overcome this presumption a provider of necessaries must intentionally forego his lien. The evidence presented in this case does not indicate that Racal/NCS intended to forego their right to a

maritime lien. Tidewater cited deposition testimony of Phillip Garrod stating:

> Q. Did you expect to be paid by Coastline?
> A. Yes.
> Q. Did you expect to be paid by Tidewater?
> A. No.

(Exh. E, depo. of Garrod, p. 145).

In *Gulf Oil Trading Company v. M/V CARIBE MAR*, 757 F. 2d 743 (5th Cir. 1985), the court stated that the creditor must intentionally forego the maritime lien and look solely to the credit of the vessel. Garrod's testimony does not indicate that Racal/NCS waived their right to a maritime lien, but merely stated that they expected to be paid by Coastline and not by Tidewater. A provider of necessaries may in fact look to both ship and ship owner for payment. "Accepting promises by the owner to pay the debt . . . would not be indicative of an intention to waive the lien. 2 Benedict 3-23.

Tidewater also claims that the affidavit of Keith Jones indicates that Racal/NCS intended to forego their right to a maritime lien. Jones affidavit states:

> NCS International relied solely on the credit of Coastline Geophysical, Inc.
>
> * * *
>
> NCS International Inc. Did not rely upon the credit of any vessels which would be chartered by Coastline.

As stated earlier, Racal/NCS filed a motion to strike Jones' affidavit. The court finds that Jones' affidavit does not indicate, within the affidavit itself, that the assertions of Jones were based on personal knowledge as required by Fed. R.Civ.P.Rule 56(e). Mr. Jones affidavit is speculative in this sense because no basis was given as to how he personally knew. that Racal/NCS was relying solely on the credit of Coastline. Nevertheless, nothing in Jones affidavit exhibits

the existence of an express agreement that Racal/NCS relied solely on the credit of Coastline as required by the Act. *Benedict on Admiralty* S 38, at 3-53 (7th Ed.1992). Tidewater also contends, relevant to this issue, that because the Time Charter Agreement contained a no-lien provision that Racal/NCS do not possess a maritime lien. The current law is that a supplier of necessaries may still attain a maritime lien, even if a no-lien provision between the owner and charterer exists. *Benedict on Admiralty* S 38, at 3-40 (7th Ed.1992). If a supplier is aware that the vessel is under a charter agreement, "he will not be charged with knowledge of a no-lien provision absent affirmative evidence that he had received express notice from the owner or other reliable source that the vessel was not to be bound." *Benedict on Admiralty* S 38, at 3-40 (7th Ed. 1992). This court finds that the evidence presented by Tidewater regarding the noticing of Racal/NCS as to the no-lien provision in the charter. For these reasons, the court finds that Coastline was a charterer under the meaning of the Act and that they had the authority to procure necessaries for the vessels.

The second issue in this matter is whether the equipment and services provided by Racal/NCS were necessaries under the meaning of the Act. According to the Act, "repairs, supplies, towage are deemed necessaries under the Act.. 46 U.S.C. S 31301(4). In *Equilease v. M/V SAMPSON*, 793 F.2d 598, 603 (5th Cir.1986)(en banc), the Fifth Circuit classified necessaries as "most goods or services that are useful to the vessel, keep her out of danger and enable her to perform her particular function." The court finds that the seismic equipment Racal/NCS provided were necessaries under the meaning of the Act. The facts clearly demonstrate that the equipment provided by Racal/NCS was useful to the vessels. The equipment basically was installed to help better predict the presence of oil and natural gas. These vessels were chartered to Coastline for the purpose of exploration of oil

and natural gas; hence, the equipment was useful and therefore "necessary" to the vessel.

The third and final issue is whether these necessaries were provided directly to Coastline rather than to said vessels. As stated, Tidewater contends that because Coastline retained authority with regard to the placement of equipment on the vessels, no maritime lien existed. In support of this contention, Tidewater relies on the holding in *Silver Star Enterprises, Inc. v. M/V Saramacca*, 82 F. 3d 666 (5th Cir. 1996). In *Silver Star*, the Fifth Circuit held that no statutory lien existed when goods or services are provided to the owner or charterer for use at its discretion instead of to a specific vessel. *Silver Star Enterprises. Inc. v. M/V Saramacca*, 82 F. 3d 666 (5th Cir. 1996). Tidewater claims that since Coastline retained authority to place the equipment on the vessels of their choosing, no valid maritime lien exists. (Exh. P, Racal/NCS February 1996 Proposal and contract; Exh. E, depo. of Garrod, p. 35-36).The court in *Silver Star* felt bound by the seminal Supreme Court case, *Piedmont & Georges' Creek Coal Co. v. Seaboard Fisheries Co.*, 254 U.S. 1, 41 S.Ct. 1, 65 L.Ed. 97 (1920). This court notes the decisions in *Silver Star* and *Piedmont*, but distinguishes those cases from the case at bar. *Piedmont* and *Silver Star* involved situations where the owner of the vessels had purchased or leased products in bulk from a supplier. Also, in neither case did the supplier deliver the goods directly to the vessel. In the case at bar, the seismic equipment provided may not have been earmarked at the time Racal/NCS and Coastline contracted, but this is not fatal to the establishment of a maritime lien. This court relies on the 1940 Supreme Court case that distinguished Piedmont and sustained a claim for maritime liens, even though the oil was not earmarked for a specific vessel, on the ground that "oil was supplied exclusively for the vessels in question [and] was deliverd directly to the vessels and was so invoiced." *Dampskibsselskabet Dannebrog v. Signal Oil & Gas Co.*, 310 U.S. 268, 277, 60

S.Ct. 937, 942, 84 L.Ed. 1197 (1940). The court finds that the facts demonstrate that Racal/NCS delivered the seismic equipment directly to the vessel and subsequently installed the equipment directly to the vessel and subsequently installed the equipment at Quality Shipyards, a subsidiary owned by Tidewater. The fact that the equipment was installed at Quality Shipyards ws an important factor for this court in reaching this decision. Tidewater had ample opportunity to notice Racal/Coastline as to the existence of the no-lien provision in the charter, if this glaring omission had not occurred, Racal/NCS could not have claimed a maritime lien. For these reasons, the court finds that the equipment was provided to the vessels and not directly to Coastline as Tidewater contended.

CONCLUSION

Based on the foregoing analysis, the Plaintiffs' Motion for Partial Summary Judgment [87-1] regarding Plaintiff's claims to a valid maritime lien is GRANTED. Consolidated Plaintiff's Motion for Summary Judgment [107-1] is DENIED. Also Plaintiff's Motion to Strike the affidavit of Keith Jones [121-1] is GRANTED.

THUS DONE AND SIGNED at Lafayette, Louisiana this 23rd day of October, 1997.

/s/ Richard T. Haik
RICHARD T. HAIK
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

CIVIL ACTION
CONSOLIDATED NO. 97-1628
JUDGE HAIK
MAGISTRATE JUDGE METHVIN
RACAL SURVEY U.S.A., INC., *et al*
versus
M/V COUNT FLEET, *et al*

CIVIL ACTION
CONSOLIDATED NO. 97-1692
JUDGE HAIK
MAGISTRATE JUDGE METHVIN
TIDEWATER MARINE INTERNATIONAL, INC.
versus
TWO HIGH PRESSURE AIR COMPRESSORS, ETC., *et al.*

CIVIL ACTION
CONSOLIDATED NO. 97-1668
JUDGE HAIK
MAGISTRATE JUDGE METHVIN
TIDEWATER MARINE INTERNATIONAL, INC.
versus
THAT CERTAIN SEISMIC EQUIPMENT, ETC.

AMENDED RULING TO CORRECT TYPOGRAPHICAL ERROR

Pending before the Court is Plaintiffs Racal Survey U.S.A. and N.C.S. Intl. Inc., hereafter referred to as Racal/NCS. Motion for Partial Summary Judgment pursuant to Federal Rule of Civil Procedure 56. The Motion was properly filed with the Clerk of Court for the Western District of Louisiana on March 5, 1998. Consolidated Plaintiff, Tidewater Marine Intl., hereafter referred to as Tidewater, filed their own Motion and Memorandum for Summary Judgement [107-1, 108-1] that also contained an Opposition to Racal/NCS' Motion for Partial Summary Judgment on July 9, 1998. Plaintiff, Racal/NCS filed a Memorandum in Opposition to Tidewater's Motion for Summary Judgement [122-1] on July 23, 1998. Also on July *23*, 1998, Plaintiff filed a Motion to Strike the Affidavit of Keith Jones [121-1]. On August 6, 1998, Tidewater filed a memorandum in opposition to Plaintiffs Motion to Strike [137-1]

After a thorough review of both Motions for Summary Judgment, and the Oppositions thereto, and for reasons contained herein, Plaintiffs' Motion for Summary Judgment [87-1] is GRANTED. Consolidated Plaintiffs Motion for Summary Judgement [107] is DENIED. Also, Plaintiffs Motion to Strike the Affidavit of Keith Jones [121-1] is GRANTED.

FACTS

The facts pertinent to the resolution of the pending motion are as follows. On February 16, 1997, Tidewater entered into a Blanket Time Charter Agreement with Coastline Geophysical. According to the Time Charter, Tidewater was to provide to Coastline four vessels suited for offshore activities in the mineral and oil industry. Subsequent to the first charter, N.C.S. installed various seismic equipment and computer equipment aboard the four vessels that Coastline had chartered from Tidewater. Following the installation of

the equipment, the four vessels embarked on a seismic expedition in the Gulf of Mexico in search of oil and natural gas. The equipment that N.C.S. provided to Coastline basically allowed the four vessels to coordinate information amongst themselves in order to better facilitate their search for oil and gas. The first two vessels laid cable upon the ocean floor. A third vessel, the source vessel, sent information along the cable via airgun shots from caterpillar machinery located on the vessel. The fourth vessel recorded data generated from these airgun shots.

On August 14, 1997, Coastline chartered four different vessels from Tidewater. These vessels, the M/V SECRETARIAT, M/V COUNT FLEET, M/V COUNT TURF, AND M/V MILTON TIDE were chartered out for seismic exploration in Africa. The motions for summary judgements filed by both sides pertain to these four vessels.

Following the second charter, the N.C.S. equipment used on the first expedition in the Gulf of Mexico was placed on the M/V SECRETARIAT, M/V COUNT FLEET, M/V COUNT TURF, AND M/V MILTON TIDE at Quality Shipyards, a subsidiary owned by Tidewater. Also Racal Survey supplied equipment that would receive positioning correction data. This data would then be transferred by the Racal Survey equipment to the N.C.S. computer system aboard each recorder vessel. The African expedition, like the Gulf expedition, involved coordination of information among the four vessels in their search for oil and gas. Relying on information generated from N.C.S. equipment, two of the vessels laid cable. A third vessel, the source vessel, sent information along the cable via airgun shots from caterpillar machinery. The fourth vessel recorded data generated from these airgun shots. The data collected from these seismic operations would then be analyzed. This analysis was supposed to help better predict the presence of oil and natural gas.

Coastline, now defunct, was not able to meet the obligations it owed to N.C.S. and Racal for the use of said equipment; therefore, together. they have filed a motion for partial summary judgement claiming a valid maritime lien on said vessels.

SUMMARY JUDGMENT

A. Applicable Law

Under Rule 56 of the Federal Rules of Civil Procedure. Summary judgment shall be granted where:

> the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

No genuine issue of material fact exists "where the record as a whole could not lead a rational trier of fact to find for the nonmoving party." *Celotex Cop. v. Catrett*, 477 U.S. 317, 322-24, 106 S.Ct. 2548. 2552-53. 91 L.Ed.2d 265 (1986). The burden of proof as to the lack of genuine issue of fact is on the moving party, and a court should not grant summary judgment unless convinced that there is no evidence to sustain a recovery under any circumstances.

In determining the existence of such genuine issues of material fact, this Court must view the record in a light most favorable to the nonmoving party and must give that party the benefit of all reasonable inferences to be drawn from the facts. *Matsushita Electric Industrial Co. v. Zenith Radio Corps*, 475 U.S. 574, 106 S.Ct. 1348, 1356-57, 89 L.Ed.2d 538 (1986). Thus, summary judgment is inappropriate where there is a genuine disagreement as to the reasonable inferences to be drawn from undisputed facts, *Xerox Corp. v. Genmoora Cop.*, 888 F.2d 345, 352 (5th Cir. 1989), or when the summary judgment evidence is subject to conflicting

interpretations. *Field v. City of South Houston. Tex.*, 922 F.2d. 1183, 1191 (5th Cir. 1991).

Although. as noted previously, the burden of proof as to the lack of a genuine issue of material fact is on the moving party, the moving party may shift this burden by showing an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. at 325, 106 S.Ct. At 2553-54; *Lavespere v. Niagara Machine & Tool Works. Inc.*, 910 F.2d 167, 178 (5th Cir. 1 990). The burden then shifts to the nonmoving party who must come forward with evidence to support his claim. *Id.* To establish the sufficiency of the evidence, the nonmover must "go beyond the pleadings" and designate facts to support each element of the cause of action, showing that there is a genuine issue of material fact. Id. The Court must not weigh evidence on summary judgment. *Anderson v. Liberty Lobby. Inc.*, 477 U.S. 242, 249, 106 S.Ct. 2505, 2510-1 1, 91 L.Ed.2d 202 (1986); *Amburgey v. Corhart Refractories Corp. Inc.*, 936 F.2d. 805. 809 (5th Cir. 1991). The movant is entitled to all reasonable and justifiable inferences from the evidence submitted. *Anderson v. Liberty Lobby. Inc.*, 477 U.S. at 255, 106 S.Ct. At 25 13-14.

B. Parties' Contentions

Pursuant to Federal Rule of Civil Procedure 56, Plaintiffs have filed the instant Partial Motion for Partial Summary Judgment. In support of the Partial Motion for Summary Judgment, Racal/NCS contend that they possess a valid maritime lien pursuant to the Maritime Lien Act (the Act). Racal/NCS claim that the equipment that they provided were necessaries as defined by the Act and that Coastline, as a charterer, had the legal authority to bind the aforementioned vessels to a maritime lien. Racal/NCS further contend that because they provided necessaries to 'the vessel on the order of a person authorized by the owner, it has a right to enforce the lien without having to prove that credit was given to the vessel rather than to Coastline.

Tidewater claims they are entitled to summary judgement because Racal/NCS do not possess a lien on Tidewater vessels. Tidewater contends that four requirements must be met for there to be a valid maritime lien under the Act:

1. The goods or services must be necessaries to the vessel;
2. The goods or services must be provided to a vessel,
3. The goods or services must be provided on the order of the owner; and
4. The goods or services must be provided on the credit of the vessel rather than on the personal credit of the owner or charterer.

46 U.S.C. §31342; *Eguilease Corp. v. M/V Sampson*, 793 F.2d 598 (5th Cir. 1986).

Tidewater claims that the goods and services were provided on the credit of Coastline. In support of this contention. Tidewater points to the deposition testimony of Philip Garrod who was Racal/N.C.S.'s Vice President of Operations. Excerpts from the relevant part of the deposition are as follows:

Q. Did you expect to be paid by Coastline?

A. Yes.

Q. Did you expect to be paid by Tidewater?

A. No.

(Exh. E, depo. of Garrod, p. 145).

Tidewater also asserts that the affidavit submitted by Keith Jones, Coastline's former President, confirms the assertion that Racal did not rely on the credit of the vessels. (Exh. F affid. Of Jones). The affidavit reads in part as follows:

> NCS international relied solely on the credit of Coastline Geophysical, Inc.

* * *

NCS International Inc. Did not rely upon the credit of any vessels which would be chartered by Coastline.

Racal/NCS has filed a Motion to Strike the affidavit of Jones claiming that the affidavit is not based on personal knowledge, constitutes hearsay. and is solely made up of conclusory allegations. Tidewater urges that Jones' presence at negotiation meetings between Racal/NCS and Coastline demonstrates that he has personal knowledge as to the intentions of Racal/NCS regarding the issue of reliance.

Also, Tidewater asserts that the goods and services were not vessel necessaries and were not provided to the vessels within the meaning of the Act. Tidewater contends that the goods and services were provided to Coastline and not to the vessels themselves. Tidewater claims that no statutory lien exists when the goods or services are provided to the owner or charterer for use at its discretion instead of to a specific vessel. *Silver Star Enterprises. Inc. v. MN Saramacca*, 82 F.3d 666 (5th Cir. 1996). Tidewater claims that since Coastline retained authority to place the equipment on the vessels of their choice, no valid maritime lien exists. (Exh. P, Racal/NCS February 1996 Proposal and contract; Exh. E, depo. of Garrod, p. 35-36).

LAW AND ANALYSIS

46 U.S.C. § 31342 (a) (Supp. 1998) states that a person providing necessaries to a vessel on the order of the owner or a person authorized by the owner-

(1) has a maritime lien on the vessel;
(2) may bring a civil action in rem to enforce the lien; and
(3) is not required to allege or prove that credit was given to the vessel.

There are three issues that need to be resolved in the current matter. The first issue is whether or not Coastline was a charterer under the meaning of the Act and whether or not

they had the authority to procure necessaries for the vessels. The second issue is whether the equipment and services were necessaries under the meaning of the Act. The third issue is whether these necessaries were provided directly to Coastline rather than to said vessels.

In order to resolve the first issue of whether Coastline had the authority to procure necessaries for the vessels, the nature of the relationship between Coastline and Tidewater must be determined. As stated earlier, Coastline and Tidewater entered into two Time Charter contractual agreements. The terms of both contacts named Coastline as a charterer of vessels owned by Tidewater. Under the Maritime Lien Act, a charterer of a vessel is one who becomes entitled to use of whole of whole of vessel belonging to another (owner) as a result of charter agreement. 46 U.S.C. § 31341. In *Trico Marine Operations. Inc. v. Falcon Drilling Co.*, 116 F.3d 159, 161 (5th Cir. 1997), the court characterized an agreement in which the owner provided a vessel, crew, and equipment to another party as a charter under the meaning of the Act. According to the terms of the Time Charters between Tidewater and Coastline, Tidewater would provide the vessel, crew and equipment to Coastline; therefore, the contract for the use of the Tidewater vessels by Coastline demonstrates that Coastline was a charterer under the meaning of the Act. A charterer is presumed to have the authority to procure necessaries for a vessel. 46 U.S.C. § 31341. To overcome this presumption a provider of necessaries must intentionally forego his lien. The evidence presented in this case does not indicate that Racal/NCS intended to forego their right to a maritime lien. Tidewater cited deposition testimony of Phillip Garrod stating:

Q. Did you expect to be paid by Coastline?
A. Yes.
Q. Did you expect to be paid by Tidewater?
A. No.

(Exh. E, depo. of Garrod, p. 145).

In *Gulf Oil Trading Company v. M/V CARIBE MAR*, 757 F.2d 743 (5th Cir. 1985), the court stated that the creditor must intentionally forego the maritime lien and look solely to the credit of the vessel. Garrod's testimony does not indicate that Racal/NCS waived their right to a maritime lien, but merely stated that they expected to be paid by Coastline and not by Tidewater. A provider of necessaries may in fact look to both ship and ship owner for payment. "Accepting promises by the owner to pay the debt . . . would not be indicative of an intention to waive the lien. 2 Benedict 3-23.

Tidewater also claims that the affidavit of Keith Jones indicates that Racal/NCS intended to forego their right to a maritime lien. Jones affidavit states:

> NCS international relied solely on the credit of Coastline Geophysical, lnc.
>
> * * *
>
> NCS International Inc. Did not rely upon the credit of any vessels which would be chartered by Coastline.

As stated earlier, Racal/NCS filed a motion to strike Jones' affidavit. The court finds that Jones' affidavit does not indicate, within the affidavit itself, that the assertions of Jones were based on personal knowledge as required by Fed. R.Civ.P.Rule 56(e). Mr. Jones affidavit is speculative in this sense because no basis was given as to how he personally knew that Racal/NCS was relying solely on the credit of Coastline. Nevertheless. nothing in Jones affidavit exhibits the existence of an express agreement that Racal/NCS relied solely on the credit of Coastline as required by the Act. *Benedict on Admiralty* S 38. at 3-53 (7th Ed.1992). Tidewater also contends, relevant to this issue, that because the Time Charter Agreement contained a no-lien provision that Racal/NCS do not possess a maritime lien. The current law is that a supplier of necessaries may still attain a maritime lien, even if a no-lien provision between the owner and charterer

exists. *Benedict on Admiralty* S 38, at 3-40 (7th Ed.1992). If a supplier is aware that the vessel is under a charter agreement, "he will not be charged with knowledge of a no-lien provision absent affirmative evidence that he had received express notice from the owner or other reliable source that the vessel was not to be bound." *Benedict on Admiralty* S 38, at 3-40 (7th Ed.1992). This court finds that no evidence was presented by Tidewater regarding the noticing of Racal/NCS as to the no-lien provision in the charter. For these reasons, the court finds that Coastline was a charterer under the meaning of the Act and that they had the authority to procure necessaries for the vessels.

The second issue in this matter is whether the equipment and services provided by Racal/NCS were necessaries under the meaning of the Act. According to the Act, "repairs, supplies, towage are deemed necessaries under the Act. 46 U.S.C. S 31301(4). In *Equilease v. M/V SAMPSON*, 793 F.2d 598, 603 (5th Cir.1986)(en banc), the Fifth Circuit classified necessaries as "most goods or services that are useful to the vessel, keep her out of danger and enable her to perform her particular function. "The court finds that the seismic equipment Racal/NCS provided were necessaries under the meaning of the Act. The facts clearly demonstrate that the equipment provided by Racal/NCS was useful to the vessels. The equipment basically was installed to help better predict the presence of oil and natural gas. These vessels were chartered to Coastline for the purpose of exploration of oil and natural gas; hence, the equipment was useful and therefore "necessary" to the vessel.

The third and final issue is whether these necessaries were provided directly to Coastline rather than to said vessels. As stated, Tidewater contends that because Coastline retained authority with regard to the placement of equipment on the vessels, no maritime lien existed. In support of this contention, Tidewater relies on the holding in *Silver Star*

Enterprises, Inc. v. M/V Saramacca, 82 F.3d 666 (5th Cir. 1996). In *Silver Star*, the Fifth Circuit held that no statutory lien existed when goods or services are provided to the owner or charterer for use at its discretion instead of to a specific vessel. *Silver Star Enterprises, Inc. v. M/V Saramacca*, 82 F.3d 666 (5th Cir. 1996). Tidewater claims that since Coastline retained authority to place the equipment on the vessels of their choosing, no valid maritime lien exists. (Exh. P, Racal/NCS February 1996 Proposed and contract,; Exh. E, depo. of Garrod, p. 35-36). The court in *Silver Star* felt bound by the seminal Supreme Court case. *Piedmont & Georges' Creek Coal Co. v. Seaboard Fisheries Co.*, 254 U.S. 1, 41 S.Ct. 1, 75 L.Ed. 97 (1920). This court notes the decisions in *Silver Star* and *Piedmont*, but distinguishes those cases from the case at bar. *Piedmont* and *Silver Star* involved situations where the owner of the vessels had purchased or leased products in bulk from a supplier. Also, in neither case did the supplier deliver the goods directly to the vessel. In the case at bar, the seismic equipment provided may not have been earmarked at the time Racal/NCS and Coastline contracted, but this is not fatal to the establishment of a maritime lien. This court relies on the 1940 Supreme Court case that distinguished Piedmont and sustained a claim for maritime liens, even though the oil was not earmarked for a specific vessel, on the ground that "oil was supplied exclusively for the vessels in question [and] was delivered directly to the vessels and was so invoiced." *Dampskibsselskabet Dannebrog v. Signal Oil & Gas Co.*, 310 U.S. 268, 277, 60 S.Ct. 937, 942, 84 L.Ed. 1197 (1940). The court finds that the facts demonstrate that Racal/NCS delivered the seismic equipment directly to the vessel and subsequently installed the equipment at Quality Shipyards, a subsidiary owned by Tidewater. The fact that the equipment was installed at Quality Shipyards was an important factor for this court in reaching this decision. Tidewater had ample opportunity to notice Racal/Coastline as to the existence of the no-lien

provision in the charter, if this glaring omission had not occurred, Racal/NCS could not have claimed a maritime lien. For these reasons, the court finds that the equipment was provided to the vessels and not directly to Coastline as Tidewater contended.

CONCLUSION

Based on the foregoing analysis, the Plaintiffs' Motion for Partial Summary Judgment [87-1] regarding Plaintiff's claims t a valid maritime lien is GRANTED. Consolidated Plaintiff's Motion for Summary Judgment [107-1] is DENIED. Also Plaintiff's Motion to Strike the affidavit of Keit Jones [121-1] if GRANTED.

THUS DONE AND SIGNED at Lafayette, Louisiana this 20th day of November, 1998.

/s/ Richard T. Haik
RICHARD T. HAIK
UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE/OPELOUSAS DIVISION

CIVIL DOCKET NO. 97-1628
JUDGE HAIK
MAGISTRATE JUDGE TYNES

RACAL SURVEY U.S.A., INC., *et al*

VERSUS

M/V COUNT FLEET, *et al*

CIVIL DOCKET NO. 97-1692
JUDGE HAIK
MAGISTRATE JUDGE TYKES

TIDEWATER MARINE INTERNATIONAL, INC.

VERSUS

TWO HIGH PRESSURE AIR COMPRESSORS, ETC., *et al*

CIVIL DOCKET NO. 97-1668
JUDGE HAIK
MAGISTRATE JUDGE TYKES

TIDEWATER MARINE INTERNATIONAL, INC.

VERSUS

THAT CERTAIN SEISMIC EQUIPMENT ETC.

FINAL JUDGMENT

BE IT REMEMBERED that on August 13, 1998, came on to be heard (1) Input/Output, Inc.'s Application for Petitioner Tidewater to Show Cause Instanter or, Alternatively, Motion for Summary Judgment, (2) Tidewater Marine International, Inc.'s Motion for Summary Judgment (regarding Tidewater's claim against the equipment and compressors), (3) Input/Output, Inc.'s Response in Opposition to Tidewater's Motion for Summary Judgment and Reply to Tidewater's Opposition to Input/Output's Motion for Summary Judgment, and (4) Tidewater's Motion for Interlocutory Sale of Compressors and Equipment. After consideration of the motions, the evidence submitted and the arguments of counsel, the Court finds that the there are no genuine issues of material fact and that Input/Output, Inc. is entitled to a summary judgment and that Tidewater Marine International, Inc. ("Tidewater"), is not entitled to claim a maritime lien against the property seized.

It is therefore ORDERED that the seizure orders dated on or about August 28, 1997, September 3, 1997 and October 16, 1997, and any writs of attachment or warrants of arrest with respect to such orders are hereby dissolved and the property seized thereby is to be immediately released from the custody and control of the U.S. Marshal, Tidewater, and any other persons designated or appointed custodians pursuant to any prior orders of this Court, such property specifically including but not limited to, the Two High Pressure Air Compressors each driven by a Caterpillar 399 Diesel Engine bearing Serial Nos. 353 6652 and 35B 4016 and that certain Seismic Equipment identified in Exhibit C "Amended" attached hereto.

It is further ORDERED that Tidewater's Motion for Interlocutory Sale of Compressors and Equipment is denied.

It is further ORDERED that Input/Output inform Tidewater of the steps and process it employs in connection with any foreclosure sale of the subject equipment and compressors.

It is further ORDERED that Input/Output deposit and keep all proceeds of any sale, net of costs of sale, in separate /account/pending the exhaustion of any appeal by Tidewater of this order or any further orders of this Court or any other court of competent jurisdiction.

It is further ORDERED that Input/Output's claims against any parties in this action, including Coastline Geophysical, Inc., are dismissed without prejudice to refile same, so that Input/Output may proceed against all such parties in any other forum, under any applicable law, including the laws of Texas.

It is further ORDERED that costs not be taxed until the entire matter is concluded.

IT IS FURTHER ORDERED that although this case involves multiple parties and multiple claims, the claims that the Court determines that there are no just reasons for delay in directing the entry of this judgement denying Tidewater's maritime lien and that final judgement be entered within the meaning of Rule 54(b) of the federal rules of Civil Procedure.

THUS DONE AND SIGNED this 23rd day of October, 1998 at Lafayette, Louisiana.

/s/ Richard T. Haik
RICHARD T. HAIK
United States District Judge

APPENDIX E

[Filed Nov 20, 2000]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-31382

RACAL SURVEY USA INC; NCS INTERNATIONAL INC
Plaintiffs-Counter Defendants Appellees

v.

M/V COUNT FLEET, HER ENGINES, TACKLE, FURNITURE & APPURTENANCES IN REM; *et al*
Defendants

TIDEWATER MARINE INTERNATIONAL INC
Counter Claimant Appellant

Case No. 98-31383

RACAL SURVEY USA INC; NCS INTERNATIONAL INC
Plaintiffs

v.

M/V COUNT FLEET, HER ENGINES, TACKLE, FURNITURE & APPURTENANCES IN REM; *et al*
Defendants

TIDEWATER MARINE INTERNATIONAL INC
Intervenor Defendant-Appellant-Cross Appellee

v.

INPUT/OUTPUT INC
Intervenor Plaintiff-Appellee-Cross Appellant

Appeals from the United States District Court
for the Western District of Louisiana, Lafayette

ON PETITION FOR REHEARING EN BANC

(Opinion 10/24/00, 5 Cir., _____, _____ F.3d _____)

Before EMILIO M. GARZA, DeMOSS, and STEWART, Circuit Judges.

PER CURIAM:

Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED.R.APP.P. and 5th CIR.R. 35), the Petition for Rehearing En Banc is DENIED.

Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor (FED.R.APP.P. and 5th CIR.R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Illegible
United States Circuit Judge

APPENDIX F

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE/OPELOUSAS DIVISION

Civil Action
No.
Section:
Magistrate:

RACAL SURVEY U.S.A., INC.
and NCS INTERNATIONAL, INC.

VERSUS

MV COUNT FLEET, M/V COUNT TURF, MV SECRETARIAT, M/V MILTON TIDE, MV TAYLOR TIDE, M/V WHITTIE TIDE, MV CAMERON SEAHORSE, and MV TOUPS TIDE, their engines, tackle, furniture and appurtenances, *in rem,* and COASTLINE GEOPHYSICAL INC., *in personam.*

VERIFIED COMPLAINT OF RACAL SURVEY U. S. A., INC. AND NCS INTERNATIONAL, INC WHOLLY OWNED SUBSIDIARIES OF THE RACAL CORPORATION

NOW INTO COURT, through undersigned counsel, come Racal Survey U.S.A., Inc. ("Racal") and NCS International, Inc. ("NCS"), wholly owned subsidiaries of the Racal Corporation, plaintiffs herein, who bring this action for possession of maritime property, for enforcement of maritime liens and for collection on a maritime contract, and respectfully aver as follows:

I.

Subject matter jurisdiction of this Honorable Court is founded upon its admiralty and maritime jurisdiction pursuant to the provisions of 28 U.S.C. § 1333 and in accordance with Rule 9(h) and the Supplemental Admiralty and Maritime Rules of the Federal Rules of Civil Procedure.

3.

Plaintiffs, Racal and NCS, are foreign corporations with their offices and principal places of business in Houston, Texas. These entities were the owners of certain equipment sold and leased to the vessels named herein and were also the employers of certain service personnel who performed services aboard each of the vessels named herein.

4.

Coastline Geophysical, Inc. ("Coastline"), on information and belief, is a foreign corporation with its principal place of business in Houston, Texas and at all material times was engaged in geophysical exploration work at various locations around the globe to include, but not limited to, the Gulf of Mexico, the waters off the Coast of West Africa near Cameroon, and the waters off the coast of Trinidad. At all material times Coastline had under charter certain vessels to carry out its geophysical seismic operations including, but not limited to, the vessels named herein.

A.

Defendant, M/V TAYLOR TIDE, is a merchant vessel of the United States of America, bearing Official Number 616435, which is found in the navigable waters of the United States within this district and jurisdiction of this Honorable Court or will be found within this district and jurisdiction of this Honorable Court during the pendency of this action.

B.

Defendant, M/V TIDE, is a merchant vessel of the United States of America, bearing Official Number 658122, which is found in the navigable waters of the United States within this district and jurisdiction of this Honorable Court or will be found within this district and jurisdiction of this Honorable Court during the pendency of this action.

C

Defendant, M/V CAMERON SEAHORSE, is a merchant vessel of the United Stares of America, bearing Official Number 632330, which is found in the navigable waters of the United States within this district and jurisdiction of this Honorable Court or will be found within this district and jurisdiction of this Honorable Court during the pendency of this action.

D.

Defendant, M/V TOUPS TIDE, is a merchant vessel of the United States of America, bearing Official Number 659578, which is found in the navigable waters of the United States within this district and jurisdiction of this Honorable Court or will be found within this district and jurisdiction of this Honorable Court during the pendency of this action.

E.

Defendant. M/V COUNT FLEET, is a merchant vessel of the United States of America. bearing Official Number 576643, which is found in the navigable waters of the United States within this district and jurisdiction of this Honorable Court or will be found within this district arid jurisdiction of this Honorable Court during the pendency of this action.

F.

Defendant. M/V COUNT TURF, is a merchant vessel of the United States of America, bearing Official Number

574106, which is found in the navigable waters of the United States within this district and jurisdiction of this Honorable Court or will be found within this district and jurisdiction of this Honorable Court during the pendency of this action.

G.

Defendant, M/V SECRETARIAT, is a merchant vessel of the United States of America, bearing Official Number 626141 , which is found in the navigable waters of the United States within this district and jurisdiction of this Honorable Court or will be found within this district and jurisdiction of this Honorable Court during the pendency of this action.

H.

Defendant, M/V SECRETARIAT, TIDE. is a merchant vessel of the United States of America, bearing Official Number 626282, which is found in the navigable waters of the United States within this district and jurisdiction of this Honorable Court or will be found within this district and jurisdiction of this Honorable Court during the pendency of this action

6.

Each of the foregoing vessels is found upon the navigable waters of the United States within this district and within the jurisdiction of this Honorable Court or will be found within this district and within the jurisdiction of this Honorable Court during the pendency of this action.

7.

On or about March 26, 1996 and until about August 14. 1996, CGI had M/V TAYLOR TIDE, M/V WHITTIE TIDE, M/V CAMERON SEAHORSE, and M/V TOUPS TIDE under charter for the purpose of conducting geophysical surveying operations.

8.

On or about March 26, 1996, pursuant to its contract with CGI, NCS provided and installed certain navigational equipment, computer hardware and software, satellite navigation equipment (hereinafter collectively referred to as "equipment") aboard the vessels referenced in the foregoing paragraph, for their use in conducting geophysical surveying operations.

9.

Of the equipment provided, some was sold to CGI and some was leased to CGI.

10.

CGI also contracted with NCS for NCS to provide data transmitted via satellite ("satellite data") to the aforementioned vessels for their use in conducting geophysical surveying operations, as well as personnel to operate the equipment, and NCS provided such satellite data and personnel to the vessels.

11.

The aforementioned vessels, with the aid of the personnel, equipment, and satellite data provided by NCS, worked in concert and conducted geophysical surveying operations until about August 14, 1996.

12.

On or about August 14, 1996 and until about August 1, 1997, CGI had M/V COUNT FLEET, M/V COUNT TURF, MV SECRETARIAT, and M/V MILTON TIDE under charter for the purpose of conducting geophysical surveying operations.

13.

Following August 14, 1996, the aforementioned vessels entered Quality Shipyard, in Houma, Louisiana, where

pursuant to another contract with CGI, NCS removed certain equipment from the aforementioned vessels and installed some of that equipment and other, additional equipment aboard M/V COUNT FLEET, M/V COUNT TURF. M/V SECRETARIAT, and M/V MILTON TIDE, also for their use in conducting geophysical surveying operations.

14.

On information and belief, at the present time all such equipment is believed to be located aboard M/V COUNT FLEET, M/V COUNT TURF, and M/V SECRETARIAT, as evidenced by the attached as Exhibit "A" (5 pages).

15.

Following installation of the equipment aboard M/V COUNT FLEET, M/V COUNT TURF, M/V SECRETARIAT, and M/V MILTON TIDE, the vessels, with the aid of the personnel, equipment, and satellite data provided by NCS and also with personnel provided by Racal pursuant to contract, worked in concert and conducted geophysical surveying operations until about August 1, 1997.

16.

Neither NCS nor Racal was ever informed or advised that CGI did not have authority to encumber any of the aforementioned vessels with maritime liens.

17.

CGI made partial payment for the equipment sold to it and provided for use of the aforementioned vessels, but a balance of approximately $300,000.00 remains outstanding.

18.

Racal and NCS have invoiced CGI for the personnel, equipment leased. and satellite data provided, of which amount $661,039.35 remains outstanding.

19.

Plaintiffs have made amicable demand upon CGI for payment of these outstanding balances but to no avail.

20.

NCS and Racal are entitled to immediate possession of the leased equipment which they own and which is still located aboard M/V COUNT FLEET, M/V COUNT TURF, and M/V SECRETARIAT, or aboard any other vessel where such equipment may be found, pursuant to Supplemental Admiralty Rule D of the Federal Rules of Civil Procedure.

21.

The personnel, equipment, and satellite data provided by plaintiffs constitute necessaries provided to the aforementioned vessels, within the meaning of 46 U.S.C. § 31341, *et seq.*

22.

The owners of the aforementioned vessels knowingly derived benefit from the necessaries provided by plaintiffs.

23.

At all material times, CGI intended to use M/V TAYLOR TIDE, M/V WHITTIE TIDE, M/V CAMERON SEAHORSE, and M/V TOUPS TIDE to work in concert as a single unit to perform geophysical surveying operations. each performing a particular and necessary task to completing the operation (*i.e.*, mother vessel, slave vessels. and source vessel).

24.

During the period of about March 26, 1996 and until about August 14, 1996, because M/V TAYLOR TIDE, M/V WHITTIE TIDE, M/V CAMERON SEAHORSE, and M/V TOUPS TIDE worked in concert and were electronically

connected, via radio signals, as a single unit to perform geophysical surveying operations, each performing a particular and necessary task to completing the operation (*i.e.*, mother vessel, slave vessels, and source vessel), plaintiffs claim a maritime lien upon all vessels, by virtue of the provisions of 46 U.S.C. § 31341, *et seq.*, to the extent of all outstanding charges for the personnel, equipment (sold and leased), and satellite data provided by plaintiffs jointly to these vessels. See, *Bollinger Quick Repair, Inc. v. M/V GOLIATH*, 965 F. Supp. 1448 (D. Or. 1997); *see also*, Exhibit "B" (9 pages). The outstanding balance due to plaintiffs for such necessaries is $170,238.72. *See*, Exhibit "C" (11 pages).

25.

At all material times, CGI intended to use M/V COUNT FLEET, M/V COUNT TURF, M/V SECRETARIAT, and M/V MILTON TIDE to work in concert as a single unit to perform geophysical surveying operations, each performing a particular and necessary task to completing the operation (*i.e.*, mother vessel, slave vessels, and source vessel).

26.

During the period of about August 14, 1996 and until about August 1, 1997, because M/V COUNT FLEET, M/V COUNT TURF, M/V SECRETARIAT, and M/V MILTON TIDE worked in concert and were electronically connected, via radio signals, as a single unit to perform geophysical surveying operations, each performing a particular and necessary task to completing the operation (*i.e.*, mother vessel, slave vessels, and source vessel), plaintiffs claim a maritime lien upon all vessels, by virtue of the provisions of 46 U.S.C. § 31341, *et seq.*, to the extent of all outstanding charges for the personnel, equipment (leased only), and satellite data provided by plaintiffs jointly to these vessels. *See, Bollinger Quick Repair, Inc. v. M/V GOLIATH*, 965

F. Supp. 1448 (D. Or. 1997); *see also*, Exhibit "D" (6 pages). The outstanding balance due to plaintiffs for such necessaries is $474436.38. *See*, Exhibit "E" (30 pages).

27.

Alternatively, by virtue of the provisions of 46 U.S.C. § 31341, *et seq.*, the personnel. equipment. and satellite data provided by plaintiffs to M/V TAYLOR TIDE, M/V WHITTIE TIDE, M/V CAMERON SEAHORSE, and M/V TOUPS TIDE and actually used aboard said vessels created maritime liens in favor of plaintiffs and against the said vessels The outstanding, minimum balance due to plaintiffs for such necessaries provided to each vessel is in that amount established by the entries on the invoices attached as Exhibit "C".

28.

Alternatively, by virtue of the provisions of 46 U.S.C. § 31341, *et seq.*, the personnel, equipment, and satellite data provided by plaintiffs to M/V COUNT FLEET, M/V COUNT TURF, MV SECRETARIAT, and M/V MILTON TIDE and actually used aboard said vessels created maritime liens in favor of plaintiffs and against the said vessels. The outstanding, minimum balance due to plaintiffs for such necessaries provided to each vessel is in that amount established by the entries on the invoices attached as Exhibit "E".

29.

Racal and NCS reserve the right to supplement or amend this Complaint if additional invoices, charges, or facts are determined.

WHEREFORE, plaintiffs pray that:

1. Process in due form of law issue against defendant, Coastline Geophysical, Inc compelling it to appear and answer this Complaint within the delays provided by Law.

2. After due proceedings had, there be judgment herein in favor of plaintiffs, Racal Survey U.S.A., Inc. arid NCS International, Inc., and against defendant, Coastline Geophysical. Inc., condemning said defendant to pay the amount due to plaintiffs. together with interest thereon, all costs of these proceedings, and all attorney fees.

3. Process in due form of law issue granting plaintiffs, Racal Survey U.S.A., Inc. and NCS International, Inc., immediate possession of the leased equipment which they own and which is still located aboard M/V COUNT FLEET, M/V COUNT TURF, M/V SECRETARIAT, and M/V MILTON TIDE or aboard any other vessel where such equipment may be found, and that any owner or charterer claiming an interest in the aforementioned vessels shall be compelled to detain any vessel under their control which has aboard any of the leased equipment owned by plaintiffs and permit to plaintiffs access to said vessel to permit removal of the leased equipment.

4. Process in due form of law issue against defendant, M/A TAYLOR TIDE in accordance with Rule C and Rule E of The Supplemental Rules for Certain Admiralty and Maritime Claims, of the Federal Rules of Civil Procedure, and that all persons claiming any interest therein be compelled to appear. and answer this Complaint;

5. After due proceedings had, there be judgment herein in favor of plaintiffs, Racal Survey U.S.A., Inc. and NCS International, Inc., and against defendant. M/V TAYLOR TIDE, condemning said vessel to be sold to pay the amount which the Court determines to be due to plaintiffs, together with interest thereon, costs of these proceedings, and all costs incurred in *custodia legis;*

6. Process in due form of law issue against defendant, M/V WHITTIE TIDE in accordance with Rule C and Rule E of The Supplemental Rules For Certain Admiralty and Maritime

Claims, of the Federal Rules of Civil Procedure, and that all persons claiming any interest therein be cited to appear and answer this Complaint;

7. After due proceedings had, there be judgment herein in favor of plaintiffs, Racal Survey U.S.A., Inc. and NCS International, Inc., and against defendant, M/V WHITTIE TIDE, condemning said vessel to be sold to pay the amount which the Court determines to be due to plaintiffs, together with interest thereon, costs of these proceedings, and all costs incurred in *custodia legis;*

8. Process in due form of law issue against defendant, M/V CAMERON SEAHORSE in accordance with Rule C and Rule E of The Supplemental Rules For Certain Admiralty and Maritime Claims, of the Federal Rules of Civil Procedure, and that all persons claiming any interest therein be cited to appear and answer this Complaint;

9. After due proceedings had, there be judgment herein in favor of plaintiffs, Racal Survey U.S.A., Inc. and NCS International, Inc., and against defendant, M/V CAMERON SEAHORSE condemning said vessel to be sold to pay the amount which the Court determines to be due to plaintiffs, together with interest thereon, costs of these proceedings, and all costs incurred in *custodia legis;*

10. Process lit due form of law issue against defendant, M/V TOUPS TIDE in accordance with Rule C and Rule E of The Supplemental Rules For Certain Admiralty and Maritime Claims, of the Federal Rules of Civil Procedure, and that all persons claiming any interest therein be cited to appear and answer this Complaint;

11. After due proceedings had, there be judgment herein in favor of plaintiffs, Racal Survey U.S.A., Inc. and NCS International, Inc., and against defendant, M/V TOUPS TIDE condemning said vessel to be sold to pay the amount which the Court determines to be due to plaintiffs, together with

interest thereon, costs of these proceedings, and all costs incurred in *custodia legis;*

12. Process in due form of law issue against defendant, M/V COUNT FLEET in accordance with Rule C and Rule E of The Supplemental Rules For Certain Admiralty and Maritime Claims, of the Federal Rules of Civil Procedure, and that all persons claiming any interest therein be cited to appear and answer this Complaint;

13. After due proceedings had, there be judgment herein in favor of plaintiffs, Racal Survey U.S.A., Inc. and NCS International, Inc., and against defendant, M/V COUNT FLEET condemning said vessel to be sold to pay the amount which the Court determines to be due to plaintiffs, together with interest thereon, costs of these proceedings, and all costs incurred in *custodia legis;*

14. Process in due form of law issue against defendant, M/V COUNT TURF in accordance with Rule C and Rule E of The Supplemental Rules For Certain Admiralty and Maritime Claims of the Federal Rules of Civil Procedure, and that all persons claiming any interest therein be cited to appear and answer this Complaint

15. After due proceedings had, there be judgment herein in favor of plaintiffs, Racal Survey U.S.A., Inc. and NCS International, Inc., and against defendant, M/V COUNT TURF, condemning said vessel to be sold to pay the amount which the Court determines to be due to plaintiffs, together with interest thereon, costs of these proceedings, and all costs incurred in *custodia legis;*

16. Process in due form of law issue against defendant, M/V SECRETARIAT in accordance with Rule C arid Rule E of The Supplemental Rules For Certain Admiralty and Maritime Claims, of the Federal Rules of Civil Procedure, and that all persons claiming any interest therein be cited to appear and answer this Complaint;

17 After due proceedings had, there be judgment herein in favor of plaintiffs, Racal Survey U.S.A., Inc. and NCS International, Inc., and against defendant, M/V SECRETARIAT, condemning said vessel to be sold to pay the amount which the Court determines to be due to plaintiffs, together with interest thereon, costs of these proceedings, and all costs incurred in *custodia legis;*

18. Process in due form of law issue against defendant, M/V MILTON TIDE in accordance with Rule C and Rule E of The Supplemental Rules For Certain Admiralty and Maritime Claims, of the Federal Rules of Civil Procedure, and that all persons claiming any interest therein be cited to appear and answer this Complaint;

19. After due proceedings had, there be judgment herein in favor of plaintiffs, Racal Survey U.S.A., Inc. and NCS International, Inc., and against defendant, M/V MILTON TIDE, condemning said vessel to be sold to pay the amount which the Court determines to be due to plaintiffs, together with interest thereon, costs of these proceedings, and all costs incurred in *custodia legis;*

20. After due proceedings had, there be judgment herein granting to plaintiffs all general and equitable relief as this Court may deem just in the premises and be competent to grant.

Respectfully submitted,

LARZELERE & PICOU, L.L.P.

/s/ W J. Larzelere JR., T.A. (#8057)
W J. LARZELERE JR., T.A.
T. JUSTIN SIMPSON (#18437)
STEPHEN M. LARZELERE
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Suite 1100-Two Lakeway Center
3850 N. Causeway Boulevard
Metairie, LA 70002
Phone: (504) 834-6500

VERIFICATION

STATE OF LOUISIANA

PARISH OF JEFFERSON

BEFORE ME, the undersigned authority, personally came and appeared, PHILIP GARROD, who after first by me being duly sworn, did depose and say that he is Vice President, Resources, for plaintiff, Racal Survey, Inc.; that he was formerly was the Vice President, Operations, of NCS International, Inc.; that he was the representative of Racal Survey U.S.A., Inc. and NCS International, Inc. who participated in the transactions forming the basis of the Complaint; that he has personal knowledge of the facts stated in the above and foregoing Complaint; that he, Philip Garrod, is authorized to act as agent on behalf of Racal Survey U.S.A., Inc. and NCS International, Inc. for the purpose of the instant verification; and that he has read the foregoing Complaint and verifies that it is true and correct to the best of knowledge and information

/s/ Philip Garrod
PHILIP GARROD

SWORN TO AND SUBSCRIBED
BEFORE ME, THIS—DAY
OF AUGUST 1997.

/s/ Illegible
Notary Public

Please see next page for service instructions

SERVICE INSTRUCTIONS:

1. PLEASE ISSUE WARRANT FOR ARREST AND SEIZURE OF M/V COUNT FLEET, M/V COUNT TURF, M/V SECRETARIAT.

2. PLEASE WITHHOLD SERVICE ON COASTLINE GEOPHYSICAL, INC.

3. PLEASE WITHHOLD SERVICE UPON M/V TAYLOR TIDE, M/V WHITTIE TIDE, M/V CAMERON SEAHORSE, M/V TOUPS TIDE, and M/V MILTON TIDE.

(2)

Supreme Court, U.S.
FILED
APR 24 2001
CLERK

No. 00-1342

IN THE

Supreme Court of the United States

RACAL SURVEY, U.S.A., INC., NCS INTERNATIONAL, INC.,

Petitioners,

v.

M/V COUNT FLEET, her engines, tackle, furniture & appurtenances, *in rem*, *et al.*,

TIDEWATER MARINE INTERNATIONAL, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENT, TIDEWATER MARINE INTERNATIONAL, INC.

CLIFFE E. LABORDE III
SUSAN STAGG ROBINSON*
MELISSA L. THERIOT
LABORDE & NEUNER
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1001 West Pinhook
Lafayette, LA 70505
337-237-7000

Counsel for Respondent, Tidewater Marine International, Inc.

* *Counsel of Record*

166673

CP

(800) 274-3321 • (800) 359-6859

3 CP

QUESTION PRESENTED

Whether the Fifth Circuit was correct in concluding that petitioner had no *in rem* maritime lien against respondent's vessels under the Maritime Lien Act, 46 U.S.C. § 31341, *et seq.*, when the evidence showed that:

1. Petitioner did not rely on the credit of the vessels when providing goods and services to the charterer of the vessels; and

2. Petitioner did not provide the goods and services to the vessels within the meaning of the Maritime Lien Act because the vessels' charterer had complete discretion as to choice of vessels, placement of equipment, and assignment of personnel.

LIST OF ALL PARTIES AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rules 15, 24(1)(b), and 29.6, the following entities were parties to the proceeding in the court for whose judgment review is sought:

1. Racal Survey U.S.A., Inc.;

2. NCS International, Inc.;

3. Tidewater Marine International, Inc.; and

4. Input/Output, Inc.

Tidewater Marine International, Inc. is a wholly-owned subsidiary of Tidewater Inc., which is a publicly-held corporation, the stock of which is traded on the New York Stock Exchange.

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Tidewater Marine International, Inc. ("TMI") opposes the petition for a writ of certiorari of Racal Survey, U.S.A., Inc. and NCS International, Inc. (collectively "Racal").[1]

CITATIONS OF REPORTS OF OPINIONS BELOW

The Fifth Circuit's opinion in *Racal Survey U.S.A., Inc. v. M/V Count Fleet, et al.*, No. 98-31382, 98-31383 is reported at 231 F.3d 183. It is attached to petitioner's brief as Appendix A, pp. 1a-17a.

The district court judgment attached as petitioner's Appendix D, pp. 42a-44a, does not pertain to petitioner's claim, but is instead the ruling granting intervenor, Input/Output, Inc., all of the Coastline equipment on the TMI vessels pursuant to a UCC lien. The district court's judgment on petitioner's claim is located on the final pages of the district court's ruling and amended ruling, both of which are unreported and are attached as petitioner's Appendix B, pp. 18a-29a and Appendix C, pp. 30a-41a.

STATEMENT OF JURISDICTION

This case is within the district court's admiralty jurisdiction pursuant to 28 U.S.C. § 1333. The Fifth Circuit had appellate jurisdiction under 28 U.S.C. § 1292(a)(3) because the district court's grant of summary judgment determined the rights and liabilities of Racal and TMI. Interlocutory determinations of maritime liens and interlocutory decrees which determine the liability of at least one party to a maritime case are appealable, even when damages have not been finally determined. *Associated Metals & Minerals Corp. v. Alexanders Unity MV*, 41 F.3d 1007 (5th Cir. 1995); *Stoot v. Fluor Drilling Services, Inc.*, 851 F.2d 1514 (5th Cir. 1988).

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1. Racal is referred to as "petitioner" throughout since the two companies have now merged.

The judgment of the court of appeals was entered on October 24, 2000, and petitioner's petition for rehearing *en banc* was denied on November 20, 2000. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTES

In addition to those constitutional and statutory provisions listed by the petitioner, the following statutes are also involved in this matter:

1. The Federal Maritime Lien Act of June 23, 1910, ch. 373, 36 Stat. 604 (1910)(repealed) is relevant to the historical development of the Maritime Lien Act, 46 U.S.C. § 31341, *et seq.*:

> An Act Relating to liens on vessels for repairs, supplies, or other necessaries. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That any person furnishing repairs, supplies, or other necessaries, including the use of dry dock or marine railway, to a vessel, whether foreign or domestic upon the order of the owner or owners of such vessel, or of a person by him or them authorized, shall have a maritime lien on the vessel which may be enforced by a proceeding in rem, and it shall not be necessary to allege or prove that credit was given to the vessel.
>
> * * *
>
> SEC. 4 That nothing in this Act shall be construed to prevent a furnisher of repairs, supplies, or other necessaries from waiving his right to a lien at any time, by agreement or otherwise, and this Act shall

not be construed to affect the rules of law now existing, either in regard to the right to proceed against a vessel for advances, or in regard to laches in the enforcement of liens on vessels, or in regard to the priority or rank of liens, or in regard to the right to proceed in personam.

SEC. 5 That this Act shall supersede the provisions of all state statutes conferring liens on vessels in so far as the same purport to create rights of action to be enforced by proceedings in rem against vessels for repairs, supplies, and other necessaries.

2. Rule C of the Supplemental Rules for Certain Admiralty and Maritime Claims is the procedural vehicle by which a maritime lien is asserted and by which the claimant to the vessel answers the petition and claims the vessel.

Rule C. Actions in Rem: Special Provisions

(1) **When Available.** An action in rem may be brought:

(a) To enforce any maritime lien;

* * *

(6) **Claim and Answer; Interrogatories.** The claimant of property that is the subject of an action in rem shall file a claim within 10 days after process has been executed, or within such additional time as may be allowed by the court. . . .

3. Rule 10 of the Rules of the Supreme Court of the United States provides considerations governing review on certiorari:

Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
>
> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
>
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

STATEMENT OF THE CASE

The United States Fifth Circuit Court of Appeals concluded that Racal did not have an *in rem* lien under the Maritime Lien Act, 46 U.S.C. § 31341, *et seq.*, ("MLA") against vessels owned by TMI because the evidence demonstrated that (1) Racal did not rely on the credit of the vessels when it provided goods and services to the vessels' charterer and (2) Racal did not provide the goods and services to the vessels themselves, but instead provided them to the charterer. *Racal Survey U.S.A., Inc. v. M/V Count Fleet,* 231 F.3d 183, 190, 192 (5th Cir. 2000); Petitioner's Appendix A, pp. 12a, 16a. Racal now seeks a writ of certiorari arguing that the Fifth Circuit ignored the law and that there is a conflict in the circuits. Racal is wrong on both counts. The facts, as set forth below, prove that Racal does not have a lien under the Maritime Lien Act as that Act has been consistently interpreted by this Court as well as the circuit courts.

This action arose when Racal filed an *in rem* claim and arrested TMI's vessels seeking to hold the vessels responsible for the debts of Racal's customer, Coastline Geophysical, Inc.[2] Coastline is an insolvent seismic company that obtained seismic equipment and services from Racal. Coastline was a new company that performed offshore surveys to obtain seismic data which was provided to its clients for use in oil and gas exploration. (R.E. 10).[3] Coastline purchased and leased equipment from Racal and contracted with Racal for personnel to install, operate, and maintain the equipment.

2. TMI as owner *pro hac vice* of the vessels, M/V COUNT FLEET, M/V COUNT TURF, M/V SECRETARIAT, and their engines, tackle, furniture, and appurtenances, is claimant to these vessels in this *in rem* action.

3. TMI's record excerpts in the appellate court are cited as "R.E.," while the record is cited as "Rec. Vol."

(R.E. 8, pp. 45-47). Coastline's operations were modularized, such that the seismic equipment was housed in containers that could be easily moved from vessel to vessel to satisfy the world-wide needs of its customers as cheaply as possible. (R.E. 10; R.E. 9, pp. 38-39, 42-43, 84; Rec. Vol. 9, p. 1357).

The Racal/Coastline agreements did not involve TMI or its vessels. At the time Racal agreed to provide goods and services to Coastline, Coastline had not decided what vessels it would use or from which company it would charter the vessels. (R.E. 8, pp. 45-47). Consequently, as confirmed by Richard Pender, the president of Racal who negotiated Racal's contract with Coastline, Racal did not know or care what vessels would be used by Coastline when Racal contracted with Coastline because Coastline had not yet chartered any vessels. (R.E. 8, pp. 45-47). Racal never specified what vessels Coastline could or should use, and Coastline could and did switch vessels during its operations. (R.E. 8, pp. 45-47). Throughout the venture, Coastline retained complete discretion over the vessels that would be used. (R.E. 8, pp. 45-47). Both Racal's Vice President of Operations and Racal's surveyor admitted that Racal installed and transferred the equipment aboard vessels as directed by Coastline and that Racal would have installed the equipment on any vessel chosen by Coastline. (Rec. Vol. 9, p. 1357; exhibit E, pp. 35-36; exhibit H, p. 44; R.E. 8, pp. 45-47). The equipment and personnel were not earmarked by Racal for specific vessels. (Rec. Vol. 1, pp. 55, 57, 60, 63-65, 68-71, 74-75, 80-82, 84). The Racal personnel also worked when and where Coastline directed, and Coastline had authority to substitute Racal personnel aboard different vessels as it saw fit. (Rec. Vol. 9, p. 1357, exhibit H, pp. 65-66, 133). As Racal's surveyor explained, "We were constantly jumping from boat to boat." (Rec. Vol. 9, p. 1357, exhibit H, p. 147).

Racal's president, Pender, also confirmed that Racal did not rely on the credit of the vessels when Racal agreed to provide goods and services to Coastline. Pender testified:

> Q: So you weren't relying on [the] credit of Tidewater or any of its vessels when you were entering into this contract with Coastline?
>
> * * *
>
> A: Yeah, I mean, our contract was with Coastline. That was our customer.
>
> * * *
>
> Q: At the time of contracting with Coastline, you weren't looking to Tidewater or any of its vessels for payment of Coastline's contract with NCS?
>
> * * *
>
> A: I had no contract with Tidewater.
>
> Q: You had no dealings with Tidewater whatsoever?
>
> A: No. I had no — no.

Racal, 231 F.3d at 189; R.E. 8, pp. 50-51; Petitioner's Appendix A, pp. 9a-10a. The absence of any reliance by Racal on the credit of the vessels is obvious since Coastline had not yet chartered any vessels at the time Racal agreed to provide goods and services to Coastline. (R.E. 8, pp. 45-47). Pender further explained that Racal relied only on Coastline's personal credit, rather than the credit of the

vessels, based on a number of factors including (1) Pender's prior relationship with Coastline's president, Keith Jones, (2) Pender's investigation into Coastline's credit worthiness during contract negotiations, (3) Pender's confirmation that Coastline's funding was from reputable sources, and (4) Pender's evaluation of the proposed operation and Coastline's chance of success, which induced Pender to personally invest $50,000 in the venture. (R.E. 8, pp. 45-47).

After Coastline contracted with Racal for equipment and services, Coastline set out to charter vessels.[4] For its first survey operation in the Gulf of Mexico, Coastline chartered five offshore supply and utility vessels from Tidewater Marine, Inc. n/k/a Tidewater Marine, L.L.C. (Rec. Vol. 8, pp. 1184, 1190-1207). Under the charter, Coastline was expressly prohibited from incurring liens or permitting liens to be imposed on the vessels. *Id.* Coastline was required to pay for all equipment it loaded onto the vessels, and none of the equipment was to be provided on the credit of the vessels. *Id.* The equipment remained the property of Coastline, and Coastline was required to maintain it. *Id.*

Several months after the charter with Tidewater Marine, Coastline obtained a contract to perform a survey off the coast of Africa. To handle that job, Coastline executed a Blanket Time Charter with TMI for vessels qualified to operate overseas, and transferred the seismic equipment from the vessels operated by Tidewater Marine during the first charter to different vessels operated by TMI during the second charter. (R.E. 12; R.E. 10; Rec. Vol. 9, p. 1357; exhibit H, pp. 135-137). Coastline was permitted to install and load seismic equipment on the vessels, but had to pay for and

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4. Contrary to Racal's contention, Racal agreed to provide equipment and personnel to Coastline in February of 1996, prior to Coastline's charter of both the Tidewater Marine and TMI vessels. (R.E. 8, pp. 45-47, 60; Rec. Vol. 8, pp. 1190-1207; R.E. 12).

maintain the equipment. (R.E. 12). Coastline was again prohibited from permitting liens to be imposed on the vessels or from obtaining equipment on the credit of the vessels. *Id.*

Coastline failed to pay TMI more than $2 million in charter hire, and the charter was terminated at the conclusion of the Africa project. (R.E. 11). The TMI vessels then sailed to Trinidad for another job. When the vessels returned to the United States, Racal arrested three of the TMI vessels contending it had a maritime lien pursuant to the MLA.[5] Before the vessels could return to work, TMI was required to provide security for the amounts claimed by Racal. (Rec. Vol. 2, p. 191; R.E. 9, pp. 69-70).

At the district court, TMI filed a motion for summary judgment seeking dismissal of Racal's claims on the basis that Racal does not have a maritime lien over the TMI vessels that were arrested. Racal filed a motion for partial summary judgment seeking a declaration that it had a valid maritime lien against the three TMI vessels. The district court denied TMI's motion, but granted Racal's motion.[6] (Petitioner's Appendixes B and C).

The Fifth Circuit reversed because the undisputed facts reveal that Racal has no maritime lien against TMI's vessels under the MLA. (*Racal*, 231 F.3d at 193; Petitioner's Appendix A, p. 17a). The Fifth Circuit first held that testimony from Racal's president that he did not rely on the credit of the TMI vessels was sufficient as a matter of law to

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5. Tidewater Marine's vessels were not arrested by Racal prior to the district court's ruling and are not part of the ruling from which Racal seeks relief. However, to prevent the arrest of Tidewater Marine's vessels, Tidewater was forced to issue a second Letter of Undertaking to Racal.

6. The district court did not even mention Pender's testimony in its ruling. *See* Petitioner's Appendixes B and C.

prove that Racal did not have a lien under the MLA because it did not rely on the credit of the TMI vessels when providing goods and services to Coastline. 231 F.3d at 190; Petitioner's Appendix A, p. 12a. The Fifth Circuit then held that Racal did not provide goods and services to the vessels because the goods and services were not provided to the TMI vessels but to Coastline, which had complete discretion over which vessels would be used and onto which vessels the equipment and personnel were to be placed. 231 F.3d at 192; Petitioner's Appendix A, p. 16a. Because each of these holdings disposed of the matter, the Fifth Circuit did not address the remaining two defects in Racal's claim for a lien, i.e., the goods and services were not vessel necessaries and were not provided on the order of the owner.[7]

Racal requested rehearing *en banc* in the Fifth Circuit, contending the same things it contends in its petition for a writ of certiorari. Racal's petition for rehearing was denied, and this petition followed.

RACAL'S PETITION SHOULD BE DENIED

Racal's petition for a writ of certiorari should be denied because the Fifth Circuit correctly applied well-settled law to undisputed facts. There is no conflict among the circuits, and the Fifth Circuit interpreted and applied the MLA in accordance with 90 years of jurisprudence interpreting that statute. Contrary to Racal's argument that this Court has not addressed the issue of maritime liens in more than 60 years, both of the issues raised by Racal in its petition have been the subject of writ denials, with this Court denying writs in

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7. Because the Fifth Circuit based its decision on two defects, each of which is independently sufficient to defeat Racal's alleged lien, this Court must deem both issues worthy of review to have any potential effect on the outcome of this case.

the very cases the Fifth Circuit relied on in rendering its opinion below.[8]

Racal's actual quarrel is with the Fifth Circuit's conclusion that the evidence proved Racal had no maritime lien over TMI's vessels. In essence, Racal contends that the appellate court either made erroneous factual findings or misapplied a properly stated rule of law. Under Rule 10 of the Rules of this Court, certiorari is not warranted.

A. Maritime Liens and *In Rem* Liability

To obtain a lien under the MLA, the supplier must prove the following:

1. The goods or services must be provided **on the order of the owner**;

2. The goods or services must be **provided to the vessel**; and

3. The goods or services must be **necessary to the vessel**.

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8. This Court denied writs in *Equilease Corp. v. M/V Sampson*, 793 F.2d 598 (5th Cir. 1986)(*en banc*), where the Fifth Circuit held that reliance on the credit of the vessel was necessary for a maritime lien under the MLA and that the testimony of the supplier that it relied solely on the credit of entities other than the vessel was sufficient to prove that the supplier did not rely on the credit of the vessel. *See Fred S. James & Co. of Texas, Inc. v. Equilease Corp.*, 479 U.S. 984 (1986).

The Court also denied writs in *Foss Launch & Tug Co.*, 808 F.2d 697 (9th Cir. 1987), where the Ninth Circuit held that there is no lien under the MLA if the supplier does not furnish the supplies to a particular vessel. *See Itel Containers Intern. Corp. v. M/V C.C. San Francisco*, 484 U.S. 828 (1987). In this case, the Fifth Circuit relied upon *Silver Star Enterprises, Inc. v. Saramacca MV*, 82 F.3d 666 (5th Cir. 1996), which relied upon *Foss Launch*.

46 U.S.C. § 31342. If the supplier fails to establish any of the above elements, the supplier has no lien and cannot proceed directly against the vessel *in rem*. *Piedmont v. George's Creek Coal Co. v. Seaboard Fisheries Co.*, 254 U.S. 1, 11 (1920); *Equilease Corp. v. M/V Sampson*, 793 F.2d 598 (5th Cir. 1986)(*en banc*), *cert. denied*, 479 U.S. 984 (1986); *Farwest Steel Corporation v. Barge Sea-Span 241*, 828 F.2d 522, 524-525 (9th Cir. 1987), *cert. denied*, 485 U.S. 1034 (1988). Similarly, if the vessel proves that the supplier did not rely on the credit of the vessel, there is no maritime lien against the vessel. *Piedmont*, 254 U.S. at 9; *Equilease*, 793 F.2d at 605-606; *Farwest*, 828 F.2d at 525; *Navieros Intern-Americanos, S.A. v. M/V Vasilia Express*, 120 F.3d 304, 323 (1st Cir. 1997); *Stevens Technical Services, Inc. v. United States*, 913 F.2d 1521, 1537 (11th Cir. 1990); *In re Marine Transit Corporation*, 94 F.2d 7, 9 (2nd Cir. 1938).

The reason there can be no maritime lien without these elements is that a maritime lien constitutes a property interest in the vessel itself and is based on the legal personification of the vessel as an entity with its own liabilities separate and apart from the liabilities of the vessel owner. *Piedmont*, 254 U.S. at 8-9; *Equilease*, 793 F.2d at 602; *Foss Launch & Tug Co. v. Char Ching Shipping U.S.A. Ltd.*, 808 F.2d 697 (9th Cir. 1987), *cert. denied*, 484 U.S. 828 (1987). This property right allows a supplier to proceed against the vessel itself and to have it arrested and sold to satisfy the vessel's debts and obligations. 46 U.S.C. § 31342(a)(1); Rule C of the Supplemental Rules for Certain Admiralty and Maritime Claims. As a result, a vessel can obtain goods and services on its own credit and is a self-reliant commercial entity. *Piedmont*, 254 U.S. at 8-9. In other words, a maritime lien is more than a security device. It is a property interest in the vessel that is based on the principle that the vessel itself is liable. For this reason, maritime liens are stricti juris and will not be extended by construction, analogy, or inference.

Piedmont, 254 U.S. at 11-12. Consequently, to obtain a lien against the vessel, the supplier must have relied on the credit of the vessel and the goods and services must have been provided to the vessel, rather than to the charterer or the owner. *See e.g.*, *Piedmont*, 254 U.S. at 9-10; *Equilease*, 793 F.2d at 603, 605; *Navieros*, 120 F.3d at 323; *Itel Containers Intern. Corp. v. Atlanttrafik Exp. Service Ltd.*, 982 F.2d 765, 768-769 (2nd Cir. 1992). Here, Racal did neither.

B. No Lien Without Reliance on the Credit of the Vessel

Contrary to Racal's contention, reliance on the credit of the vessel as a requirement of a maritime lien both predates and survives the MLA. Before the MLA was enacted in 1910, suppliers could obtain federal maritime liens only on foreign vessels, that is, vessels whose home ports were in another state or country. When supplies were obtained by a vessel in a port other than her home port, it was presumed that the supplier relied on the credit of the vessel since the owner could not be found. *The St. Jago De Cuba*, 22 U.S. (9 Wheat.) 409, 417 (1824); *W.A. Marshall & Co. v. The President Arthur*, 279 U.S. 564, 567 (1929). This presumption, however, was rebuttable, and the vessel could defeat the supplier's lien rights by showing that the supplies were furnished on the owner's personal credit. *The Now Then*, 55 F. 523 (3d Cir. 1893). If the supplies were provided to a vessel in her home port, the law presumed that the supplier relied on the personal credit of the owner who regularly conducted business and could be found in the home port. *The St. Jago De Cuba*, 22 U.S. (9 Wheat.) at 416. In that case, there would be no maritime lien and the supplier would be required to seek relief pursuant to state law which varied from state to state. *See The Roanoke*, 189 U.S. 185, 193-94 (1903).

In 1910, the Maritime Lien Act was enacted to accomplish three goals:

1. To eliminate the difference between home port and foreign port transactions;

2. To eliminate the presumption that a supplier relied on the credit of the owner when the supplies were provided to a vessel in her home port; and

3. To substitute a single federal statute for state statutes conferring liens for vessel repairs, supplies, and other necessaries.

Piedmont, 254 U.S. at 11; *The President Arthur*, 279 U.S. at 567; Fitz-Henry Smith, Jr., *The New Federal Statute Relating to Liens on Vessels*, 24 Harv. L. Rev. 182, 187-188 (1910-1911).

The Act made no change to the general principles of the existing law of maritime liens. *See* S. Rep. No. 690, 61st Congress, 2d Sess. 1 (1910) (The Act makes "no change in the general principles of the law of maritime liens, but merely substitutes a single statute for the conflicting state statutes"). *See also Piedmont*, 254 U.S. at 11-12 and *The President Arthur*, 279 U.S. at 568. Consequently, the rebuttable presumption that the supplier relied on the credit of the vessel remained in place and was applicable regardless of whether the vessel was in her home port or a foreign port. This was explained in *The President Arthur*:

> [T]he Act gave a maritime lien on any vessel, whether foreign or domestic, for necessaries furnished on the order of the owner or his authorized agent, and relieved the libellant from

> the necessity of alleging or proving that credit was given to the vessel. The Committee reports show, however, that it was not intended to make any other change in the general principles of the existing law of maritime liens, and the specific provision that the Act should not be construed as preventing the furnisher of the necessaries from waiving his right to a lien, "by agreement or otherwise," indicates clearly, we think, that it was not intended to change the principles of the maritime law in respect thereto. That an express renunciation of the lien is not essential, is plain.

279 U.S. at 568 (citations omitted).

The 1910 Act, like the current MLA,[9] contained a provision which stated, "it shall not be necessary to allege or prove that credit was given to the vessel." That provision, however, did not eliminate the requirement that the supplier rely on the credit of the vessel. As made plain by this Court in *Piedmont*, *The President Arthur*, and *Dampskibsselskabet Dannebrog v. Signal Oil & Gas Co.*, 310 U.S. 268 (1940), the requirement that the supplier rely on the credit of the vessel survived the enactment of the MLA. In each case, the Court acknowledged that if the supplier did not rely on the credit of the vessel, it had no lien over the vessel. *Piedmont*, 254 U.S. at 9 (a maritime lien can arise only if the pledge of the vessel's credit was necessary); *The President Arthur*, 279 U.S. at 568 (no lien when supplier relies solely on personal security); *Dampskibsselskabet*, 310 U.S. at 276-77 (reliance presumption not rebutted when oil was supplied exclusively for the vessels in question, was delivered directly to the vessels, and was so invoiced).

9. In 1920, the Maritime Lien Act was reenacted and codified at 46 U.S.C. § 971 *et seq*. In 1988, the Act was recodified at 46 U.S.C. § 31341, § 31342, and § 31305. There was no substantive change in any provisions relevant to this case.

Further, all circuit courts addressing the issue agree that a supplier has no maritime lien without reliance on the credit of the vessel. *Navieros*, 120 F.3d at 323 (1st Cir.) (the party attacking the lien has the burden of showing that the party rendering the service relied solely on personal credit); *South Carolina State Ports Authority v. M/V Tyson Lykes*, 67 F.3d 59, 62 (4th Cir. 1995) (while sole reliance on personal security is sufficient to defeat lien, joint reliance on vessel and personal security is not sufficient); *Stevens Technical Services*, 913 F.2d at 1537 (11th Cir.)(the party attacking the lien has the burden of showing that the party rendering the service relied solely on personal credit); *Stevens Technical Services, Inc. v. SS Brooklyn*, 885 F.2d 584, 587 (9th Cir. 1989)(same); *The American Star*, 11 F.2d 479, 482 (3d Cir. 1926)(same); *West Kentucky Coal Co. v. Dillman*, 15 F.2d 25, 27 (8th Cir. 1926)(same); *In re Marine Transit*, 94 F.2d at 9 (2nd Cir.)(no lien arises without reliance on the credit of the vessel).

Commentary also confirms that there is no maritime lien under the MLA without reliance on the credit of the vessel:

> [This provision] does not mean, however, that the lien shall exist *regardless* of the question of credit. Although the reforms in the law are accomplished largely by the first section, the Act must be read as a whole and section 4 provides that nothing in the Act shall be construed to prevent a furnisher from waiving his right to a lien at any time "by agreement or otherwise." The effect of the law, therefore, is to say that when necessaries are furnished a vessel upon the order of one in authority to procure them, they shall be presumed to be on the credit of the vessel.

Fitz-Henry Smith, Jr., *The New Federal Statute Relating to Liens on Vessels*, 24 Harv. L. Rev. 182, 190 (1910-1911).

As a result, lower courts are left to determine only whether the evidence produced by the vessel is sufficient to rebut the presumption by proving that the supplier did not rely on the credit of the vessel. That is what the Fifth Circuit did here. And, given that Racal's president testified that Racal did not rely on the credit of the vessels, the Fifth Circuit correctly concluded there was no maritime lien:

> Pender's testimony clearly indicates that Racal did not rely on the credit of the vessels. Almost nothing is more conclusive than such testimony as to whether there was reliance . . . [B]ecause the testimony explicitly shows that Racal deliberately chose not to rely on the credit of the four chartered vessels, as a matter of law, Racal purposefully intended to forego its maritime lien.

Racal, 231 F.2d at 190; Petitioner's Appendix A, p. 12a.

Racal's argument that there is a conflict among the circuits is without merit. First, in an attempt to show a conflict among the Fifth, First, and Eleventh Circuits, Racal claims that the Fifth Circuit found there was no lien merely because Racal expected to be paid by Coastline. This is simply not true. All circuits, including the Fifth Circuit, hold that expectation of payment from entities other than the vessel is insufficient on its own to defeat a lien under the MLA. In fact, in this case, the Fifth Circuit specifically stated that evidence that Racal expected to be paid by Coastline was not legally sufficient to rebut the presumption of reliance on the vessel's credit. *Racal*, 231 F.3d at 190 n.6, *citing Point Landing Inc. v. Alabama Dry Dock & Shipbuilding Co.*, 261 F.2d 861, 867 (5th Cir. 1958); Petitioner's Appendix A, pp. 11a-12a.

Moreover, contrary to Racal's contention, the Fifth Circuit did not base its decision on Racal's expectation that

it would be paid by Coastline, rather than by TMI or the vessels. Instead, the Fifth Circuit relied on the testimony of Pender that Racal did not rely on the credit of the vessels when providing goods and services to Coastline: "Pender's testimony clearly indicates that Racal did not rely on the credit of the vessels. Almost nothing is more conclusive than such testimony as to whether there was reliance."[10] *Racal*, 231 F.3d at 190; Petitioner's Appendix A, p. 12a. In short, the Fifth Circuit followed the same settled rule of law followed by other circuits, and there is no conflict among the circuits on this issue.

Racal next argues that the Fifth Circuit's treatment of reliance on the credit of the vessel as a prerequisite to a lien conflicts with the First and Eleventh Circuit's treatment of non-reliance on the credit of the vessel as a waiver of the lien. Racal is again wrong. First, as the Fifth Circuit made plain in its opinion in this case and in *Equilease*, a supplier's failure to rely on the vessel's credit is a waiver of the lien. *See Racal*, 231 F.3d at 190; Petitioner's Appendix A, p. 12a (because "Racal deliberately chose not to rely on the credit of the four chartered vessels, as a matter of law, Racal purposefully intended to forego its maritime lien") and *Equilease*, 793 F.2d at 606, 607 n.9 (when the supplier "deliberately chose not to rely on the credit of the vessel, as

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10. Racal's criticism of Pender's testimony as "two bits of deposition testimony" and "the subjective intent of an employee" is further indication that Racal's complaint is merely a factual one. Racal also misinterprets Pender's testimony when it argues that the testimony merely reflects that Pender expected to be paid by Coastline. As the Fifth Circuit found, Pender expressly testified that he did not rely on the credit of the vessels when providing goods to Coastline. Once again, Racal is complaining of alleged erroneous factual findings, which are not a basis for a writ grant under Supreme Court Rule 10.

a matter of law it purposefully intended to forego its right to claim the lien.").[11] In actuality, Racal is complaining about the use of different words that mean the same thing. Other circuits have also noted the overlap between reliance as a rebuttable presumption and a waiver. In *Farrell Ocean Services, Inc. v. United States of America*, 681 F.2d 91 (1st Cir. 1982), the First Circuit explained:

> A party can waive a lien by "agreement or otherwise," but a presumption exists that the service was supplied on the credit of the vessel. The party attacking the lien has the burden of overcoming that presumption by showing that the party rendering the service relied solely on personal credit.

681 F.2d at 93. *See also Navieros*, 120 F.3d at 323; *South Carolina State Ports Authority*, 67 F.3d at 62; *Stevens Technical Services*, 913 F.2d at 1537; *American Star*, 11 F.2d at 481; *In re Marine Transit*, 94 F.2d at 9. In other words, all of the other circuits use the same standard used by the Fifth Circuit, that is, when the vessel proves the supplier did not rely on the credit of the vessel, there is no lien under the MLA:

> [I]n the absence of reliance— intentional, by presumption, or otherwise — there is no right to claim a lien; in different words, if one purposefully foregoes reliance on the credit of the vessel, it is tantamount to purposefully foregoing the right to

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11. Racal is incorrect when it states that the record does not reveal whether Racal knew of the MLA prior to Racal/Coastline agreement. Pender's deposition shows that Racal knew that vessels could be arrested in satisfaction of contractual disputes prior to agreeing to provide goods and services to Coastline and that Pender had been involved in filing an action for a lien in 1992. (Rec. Vol, Depo. of Pender, pp. 108-109).

> claim a lien against the vessel. Thus, when [the supplier] deliberately chose not to rely on the credit of the vessel, as a matter of law it purposefully intended to forego its right to claim the lien.

Equilease, 793 F.2d at 606 n.9.

In sum, the Fifth Circuit correctly applied well-settled principles dating back to the early 19th century to undisputed facts. The court did not disregard the MLA nor did it create a conflict among the circuits. Review by this Court is not warranted.

C. No Lien Unless Goods Are Provided to the Vessel

The requirement that goods be provided to the vessel means just that. One vessel of a fleet cannot be made liable under the statute for supplies furnished to other vessels in the fleet, even if supplied under a single contract. *Piedmont*, 254 U.S. at 10. The lien attaches only when a vessel has been identified at the time the obligation is incurred, that is when the debt arises or at the time of contracting. *Equilease*, 793 F.2d at 602; *Atlanttrafik*, 982 F.2d at 768; *TTT Stevedores of Texas, Inc. v. M/V Jagat Vijeta*, 696 F.2d 1135 (5th Cir. 1983). Consequently, there is no lien when goods or services are provided to the owner or charterer for use at its discretion instead of being provided directly to a specified vessel. *Silver Star Enterprises, Inc. v. M/V Saramacca*, 82 F.3d 666 (5th Cir. 1996). *See also Foss Launch*, 808 F.2d at 703;[12] *Redcliffe Americas Limited v. M/V Tyson Lykes*, 996 F.2d 47

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12. *Foss Launch* uses the term "furnishing". The term "providing" was substituted for "furnishing" when the MLA was amended in 1989. As indicated in the House of Representative report, no substantive change was intended. *See Silver Star*, 82 F.3d at 668 n.2.

(4th Cir. 1993); *Atlanttrafik*, 982 F.2d at 768-769; ***Bankers Trust Co. v. Hudson River Day Line***, 93 F.2d 457, 459 (2nd Cir. 1937); *West Kentucky Coal*, 15 F.2d at 27.

Racal is incorrect when it argues that the Fifth Circuit's holding that Racal failed to provide the goods and services to the vessels is inconsistent with this Court's holdings in *Piedmont*, 254 U.S. 1 (1920) and *Dampskibsselskabet*, 310 U.S. 268. Rather, as recognized in *Dampskibsselskabet*, *Piedmont* created a fact-based standard. *Dampskibsselskabet*, 310 U.S. at 276-77. The Fifth Circuit applied that standard to undisputed facts. Racal's real complaint is that it does not like the result.

Racal seeks to limit the holding of *Piedmont* to instances where the supplies can be used both on vessels and on land. This interpretation ignores 99% of the opinion, and certainly misses the rule of law.[13] The focus of *Piedmont* was the much broader issue of the relationships among: (1) a supplier of coal, (2) a vessel owner who could disburse and use the coal as it saw fit, and (3) vessels which ultimately received some of the coal. Because some of the supplies were ultimately used on the vessels, the Court defined the determinative question as "Was the coal furnished by the libelant, the Coal Company, or was it furnished by the Oil Corporation, the owner of the fleet?" *Piedmont*, 254 U.S. at 6.

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13. Racal is factually incorrect when it states in its petition that none of the equipment or services could be used or performed on land. Racal personnel testified that the GPS and the differential systems were not particularly maritime because they are used for "everything from driving your car to a farmer farming his field." (Rec. Vol. 9, p. 1357, exhibit H, p. 192). Racal is also incorrect when it says the primary role of the equipment was to aid the vessels because the equipment was essential to Coastline's operations as a seismic survey company, and not to the operation of TMI's vessels. (R.E. 9, pp. 39, 41-42, 75, 84, 98, 108-109; R.E. 10, pp. 14-17).

To answer that question, the Court conducted a factual inquiry and examined whether the supplier dealt directly with the officers of the vessel, whether the owner was billed, whether the vessels were specifically referenced and identified on the invoices, and whether the parties to the agreement understood that the supplies would be provided to specifically identified vessels. *Piedmont*, 254 U.S. at 6-7. The Court found it significant that under the agreement the owner, rather than the supplier, could distribute the coal to the vessels in its discretion as the purchaser of the coal. *Piedmont*, 254 U.S. at 7, 13. Based on these facts, the Court concluded that the owner, not the supplier, furnished the coal to the vessels. *Id.* at 13. Consequently, the supplier had no lien. *Id.*

The same relationships are present here. Racal provided goods and services to Coastline for use at Coastline's discretion. (R.E. 8, pp. 45-47). Coastline was free to charter any vessel from any company and could use the Racal goods and services as it saw fit aboard whatever vessels Coastline chartered. (Rec. Vol. 9, p. 1357, exhibit E, pp. 35-36, exhibit H, p. 44; R.E. 8, pp. 45-47). Like the supplier in *Piedmont*, Racal provided its goods and services to Coastline, not to the vessels. The Fifth Circuit's conclusion that Racal did not provide goods and services to the vessels is parallel to rather than inconsistent with *Piedmont*.

Racal also argues that the Fifth Circuit's decision is in conflict with *Dampskibsselskabet*, 310 U.S. 268. *Dampskibsselskabet*, however, did not address the "provided to" requirement of the MLA that is at issue here. Instead, *Dampskibsselskabet* examined whether the supplier's contract provided that "the oil should be supplied on the sole credit of Comyn as the owner or charterer of the vessels. . . ." *Id.* at 276. In fact, the Court distinguished *Dampskibsselskabet* from *Piedmont* because *Piedmont* spoke to the "provided to" requirement, not the reliance issue. *Id.* at 276-77.

In any event, *Dampskibsselskabet* is distinguishable on its facts from both *Piedmont* and this case. In *Dampskibsselskabet*, the supplies were furnished exclusively for the vessels in question and were invoiced accordingly. *Id.* at 277. The same is not true here. When comparing this case to *Dampskibsselskabet*, the Fifth Circuit evaluated whether Racal furnished its goods and services exclusively to the TMI vessels. *Racal*, 231 F.3d at 192; Petitioner's Appendix A, pp. 15a-16a. The transfer of the goods and services between vessels established that the goods and services were not provided exclusively to the TMI vessels. *Id.* Racal's argument that the Fifth Circuit's consideration of the transfer of goods and services from vessel to vessel is without precedent ignores the legal issues, and is no more than a disagreement with the Fifth Circuit's application of law to fact. *See e.g., Bellingham National Bank v. Oil Screw Pacific Horizon*, 587 F.Supp. 26, 28-29 (W.D. Wash. 1984)(the court held the supplier did not have a lien over the second vessel for the price of the net, where the owner of several vessels purchased a net for one vessel and later moved it to a second vessel, because the net was not provided to the second vessel within the meaning of the MLA).

Finally, the Fifth Circuit's decision is consistent with the other circuit courts who have addressed the issue, including the Second, Fourth, Eighth, and Ninth Circuits. In fact, in *Silver Star*, the Fifth Circuit explicitly stated that it was following the rule of law of its sister circuits by denying a maritime lien when goods were not provided to a specific vessel. *Silver Star,* 82 F.3d at 669-670. *See Redcliffe*, 996 F.2d at 51-52; *Atlanttrafik*, 982 F.2d at 769; *Foss Launch*, 808 F.2d at 698, 703. In each of these cases, suppliers of cargo containers provided containers to vessel owners or charterers who distributed the containers among their fleets as they saw fit. The courts concluded that the suppliers did not provide the containers to the vessels and therefore did

not have maritime liens. *Redcliffe*, 996 F.2d at 51-52; *Atlanttrafik*, 982 F.2d at 766, 769; *Foss Launch*, 808 F.2d at 698, 703. *See also Bankers Trust*, 93 F.2d at 459 (no maritime lien for coal provided to buyer for use at buyer's discretion because it was not provided to the vessel) and *West Kentucky Coal*, 15 F.2d at 27 (no maritime lien for oil provided to buyer for use at buyer's discretion).

CONCLUSION

There is neither an error of law nor a conflict in the circuits as suggested by petitioner. Indeed, there are no Rule 10 grounds for the grant of Racal's petition for a writ of certiorari in this fact-specific case. After reviewing the deposition testimony and affidavits of Racal's president, officers, and customers, the Fifth Circuit correctly applied well-settled law to undisputed facts to hold that Racal has no maritime lien against TMI's vessels because Racal did not rely on the credit of the TMI vessels when providing goods and services to Coastline, and Racal did not provide goods and services to the vessels within the meaning of the MLA. Racal's petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 00-1342

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IN THE

Supreme Court of the United States

RACAL SURVEY U.S.A., INC.; NCS INTERNATIONAL, INC.
Plaintiffs-Counter Defendants-Appellees,

v.

M/V COUNT FLEET, her engines,
tackle, furniture & appurtenances in rem, *et al.*,
Defendants,

TIDEWATER MARINE INTERNATIONAL, INC.,
Counter Claimant-Appellant.

RACAL SURVEY U.S.A., INC.; NCS INTERNATIONAL, INC.,
Plaintiffs,

v.

M/V COUNT FLEET, her engines,
tackle, furniture & appurtenances in rem, *et al.*,
Defendants,

TIDEWATER MARINE INTERNATIONAL, INC., INTERVENOR
Defendant-Appellant-Cross-Appellee,

v.

INPUT/OUTPUT, INC., INTERVENOR
Plaintiff-Appellee-Cross-Appellant.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Fifth Circuit

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REPLY BRIEF

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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REPLY BRIEF

The Respondents do not address key points the petition raises, and the objections they do offer are insubstantial.

1. The Respondents do not deny that the petition presents significant issues that affect maritime commerce at ports throughout the country.

2. The Respondents also do not dispute that the Fifth Circuit decision turns upon a non-literal reading of the Federal Maritime Lien Act, and indeed, judicially nullifies an important reform that Congress enacted. The FMLA provides that "a person providing necessaries to a vessel on the order of the owner or a person authorized by the owner . . . has a maritime lien on the vessel . . . *and is not required to allege or prove in the action that credit was given to the vessel.*" 46 U.S.C. § 31342 (emphasis added). But the Fifth Circuit's decision rests on a finding that the testimony of Racal's president "clearly indicates that Raçal did not rely on the credit of the vessels." Pet'r App. 12a. This is just the sort of finding that the Act's terms forbid as a ground for denying a lien. Indeed, the court of appeals admitted, in *Equilease Corp. v. M/V Sampson*, 793 F.2d 598 (5th Cir. 1986)(en banc), on which the *Racal* court relied, that its reading was contrary to the statutory language: "*Despite the language of the Act*, the idea of credit to the vessel being a prerequisite to a lien . . . [is] still very much with us today." *Id.* at 605 (emphasis added).

The Respondents recognize, as candidly as the court of appeals recognized, that even though the Act provides that "it is not necessary to allege or prove that credit was given to the vessel" to obtain a lien, the Fifth Circuit holds that the Act "did not eliminate the requirement that the supplier rely on

the credit of the vessel." Opp'n at 15. Thus Respondents readily admit that the Fifth Circuit's holding reads right out of the Act the language that Congress had put in. The Court should grant certiorari to restore the application of the plain language of the statute.

3. Respondents also seek to deny the existence of a conflict among the Circuits in the application of the FMLA in the Fifth Circuit on the one hand, and the First and Eleventh Circuits on the other. Respondents assert that, in fact, the Circuits all follow the same approach, and that the Fifth Circuit did *not* establish a prerequisite not contained in the Act, but rather merely applied the provision of the FMLA that allows a supplier to waive the right to a maritime lien.

This argument does not avail Respondents. First, the Fifth Circuit opinion does not refer to, much less rely on, the FMLA's waiver provision, now codified at 46 U.S.C. § 31305. Nor does the Fifth Circuit doctrine turn on any notion of waiver. The Fifth Circuit requires proof of reliance on the credit of the vessel as a necessary "prerequisite" to the creation of a lien. *Equilease*, 793 F.2d at 605. Under the Fifth Circuit's formulation, a supplier may fail to obtain a lien simply by lack of knowledge of, or failure to advert to, what would happen in the event that the owner or charterer of the vessel did not pay. *See* Pet. 4, fn.2. The First and Eleventh Circuits expressly declined to make such a holding (*see* Pet. 13), and, by contrast, hold (1) that a lien automatically arises upon the furnishing of necessaries to a vessel, regardless of evidence of how the supplier expected to be paid, and (2) while the lien can be waived under the Act, such a waiver must be a knowing, affirmative act. *Farrell Ocean Servs., Inc. v. United States*, 681 F.2d 91, 92-94 (1st Cir. 1982); *Stevens Tech. Servs., Inc. v. United States*, 913

F.2d 1521, 1536-1537 (11th Cir. 1990).[1] The Fifth Circuit did not require such evidence in the present case, but contented itself with holding that petitioner had not shown that it relied on the FMLA.[2]

This difference is extremely significant. First, the Fifth Circuit's holding renders the waiver provision of the FMLA surplusage – there is no need to have a waiver provision if to establish a lien in the first place it is necessary to show an intention to rely on the statutory lien. Moreover, as Judges Davis, Randall, and Higginbotham correctly observed in dissent in *Equilease*, the Fifth Circuit's doctrine makes the Act a trap for the unwary: "[t]he small, unsophisticated supplier uninformed about liens and unaware that his services or supplies give rise to a maritime line will face a serious problem." *Equilease*, 793 F.2d at 610. In the First and Eleventh Circuits, the Act's requirement that there be an affirmative waiver to deprive a supplier of a lien assures that only persons who know about, and intend not to avail themselves of, the FMLA's provisions, will not give up its

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[1] Respondents provide (Opp'n at 15) an incomplete, and somewhat misleading, quotation from *The President Arthur*, 279 U.S. 564 (1929). This Court there held that the libellant's having specifically obtained other security than a maritime lien, and having by contract stated that that arrangement was exclusive and that there were no other agreements between it and the owner of the vessel, had excluded the possibility of relying on a maritime lien as well. *Id.* at 571-572. Thus the decision does not avail Respondents here.

[2] To put it another way, even assuming that the Respondents are correct and that the Fifth Circuit was merely holding that petitioner had waived its right to a maritime lien under the Act, there would still be a conflict among the Circuits because of the radically different way they interpret what it takes to waive the right to a lien under the Act: in the First and Eleventh Circuits, to be effective, a waiver must be a knowing and deliberate relinquishment of the right to a lien, while in the Fifth Circuit, a waiver can arise through ignorance or failure to state reliance.

protection. In the Fifth Circuit, as the present case shows, the lien can be lost by ignorance or inadvertence.

4. With respect to the Fifth Circuit's holding that the maritime seismic equipment was not furnished to the vessels within the meaning of the FMLA, here again that court expressly states that rather than look to the terms of the statute itself, which say nothing about any requirement that the vessel to which necessaries are supplied be specifically identified, the court would rely on pre-statutory caselaw. Pet. 13a. Respondents recognize, as did the Fifth Circuit, that the holding that a lien fails unless the vessels which are supplied are specifically identified cannot be squared with the text of this Court's opinion in *Dampskibsselskabet Dannebrog v. Signal Oil & Gas Co. of Cal.*, 310 U.S. 268 (1940), allowing a general maritime lien under the FMLA against "any and all vessels owned, chartered, or operated by" the charterer – similarly to the scope of lien sought by Racal here. Like the Fifth Circuit, Respondents seek to evade this Court's decision by characterizing the language in question as dictum and attempting to distinguish that case. Opp'n at 22. However, Respondents do not respond to the showing in the petition, (*see* Pet. 22), that the Fifth Circuit decision creates a conflict among the courts as to how to interpret the *Dampskibsselskabet* opinion on that very point.

Respondents also do not contest that this Court's decision in *Piedmont & George's Creek Coal Co. v. Seaboard Fisheries Co.*, 254 U.S. 1 (1920), which the Fifth Circuit heavily relied on, dealt only with a situation in which the claimed necessary was coal that had been provided for uses that were both maritime and non-maritime. *See* Opp'n at 21. The latter use, of course, is not covered by the Act. But Respondents, like the Fifth Circuit, offer no reason why it was appropriate for the Fifth Circuit to extend *Piedmont* to cases, like the present, in which there is no question that the

necessaries furnished were intended for use on vessels.[3] Instead, Respondents seek to go off on an irrelevant factual byway by disputing whether some portion of the equipment supplied, if taken out of the entire package, could have had a non-maritime use. *See* Opp'n at 21 and fn.3. That is not the issue, however. The question is whether the necessaries are furnished to a vessel, not whether they might also be useful on land. There is no question here that (unlike the coal in *Piedmont*, for example) the marine seismic equipment furnished by Racal, which was designed to be integrated into a vessel's navigation equipment, was supplied for use on vessels only.

CONCLUSION

For the foregoing reasons, as well as those stated in the Petition, the writ of certiorari should be granted.

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May 16, 2001

[3] Respondents correctly point out that the Ninth Circuit so interpreted the FMLA in *Foss Launch & Tug Co. v. Char Ching Shipping U.S.A., Ltd.*, 808 F.2d 697, 701 (9th Cir. 1987). But the sole statutory ground given by the Ninth Circuit for that holding is that "Congress chose not to draft the Act in the passive voice and we think the correct inference is that Congress intended 'furnishing' to require active forethought or advance identification of particular vessels in relation to 'necessaries' supplied." This is a remarkably unconvincing piece of reasoning.